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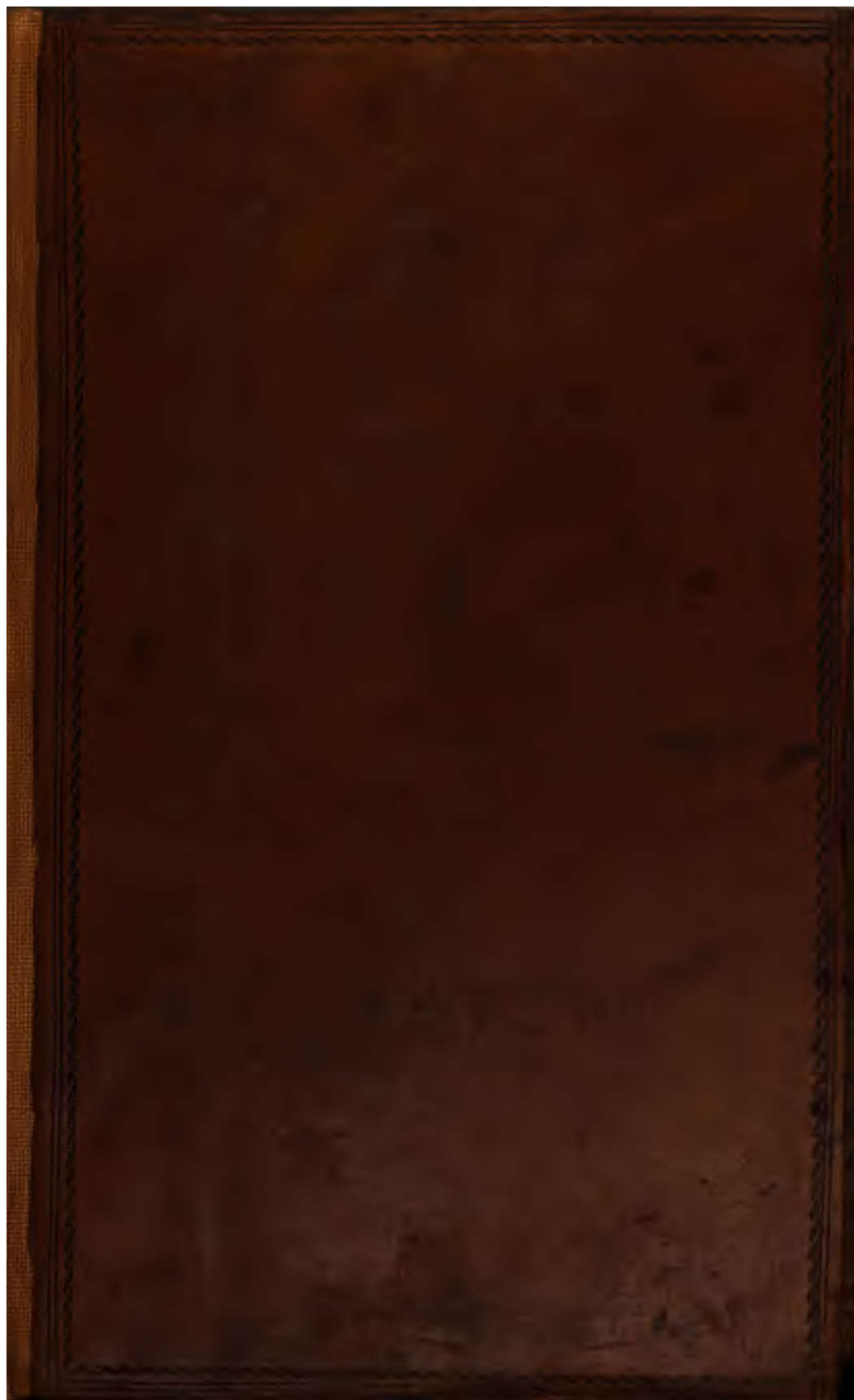
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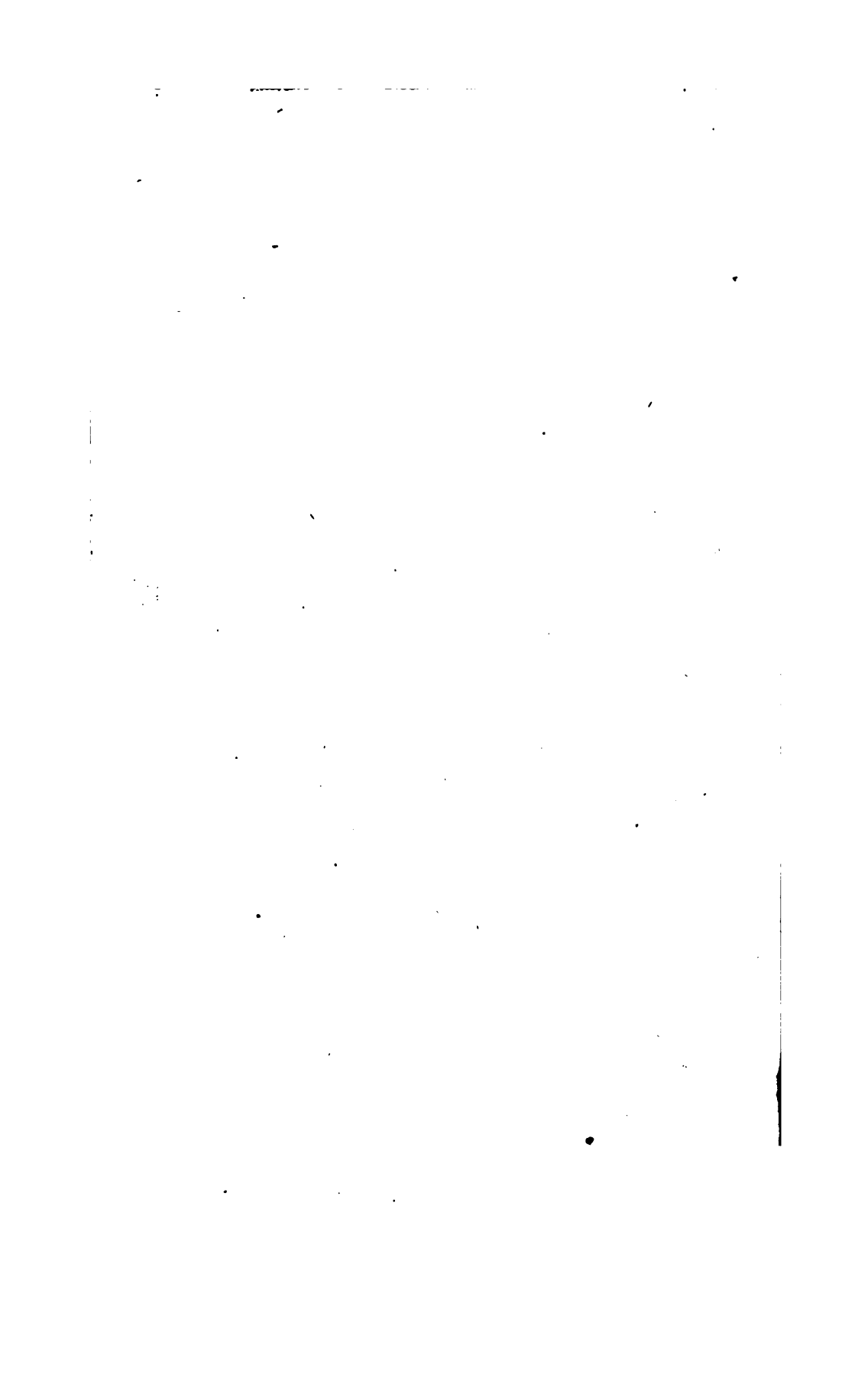
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TREATISE ON LEASES,

EXPLAINING

THE NATURE AND EFFECT

OF THE

CONTRACT OF LEASE,

AND THE

LEGAL RIGHTS ENJOYED BY THE PARTIES.

**By ROBERT BELL, Esq. ADVOCATE,
LECTURER ON CONVEYANCING, APPOINTED BY THE SOCIETY OF
WRITERS TO THE SIGNET.**

THIRD EDITION CONSIDERABLY ENLARGED.

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TO

THIRD EDITION.

THE Second Edition of this Work was published in the year 1805. In the present Edition, the Editor has endeavoured to make such corrections and additions as have been rendered necessary by the decisions pronounced since that time; but as he did not consider himself entitled to make any alteration on the text, or general arrangement of the Book, the additional matter has been confined exclusively to the foot notes. The text remains as before, except that some obvious verbal inaccuracies have been corrected, and the references to authorities, and the details of some of the cases, have been thrown into the notes.

This Edition will be found to contain references to upwards of two hundred additional cases, many of them prior in date to the publication of the former Editions, in which they appear to have been omitted. Care has been taken to make these references with accuracy; and it has been thought proper to refer to reported cases, not only as they stand in the original Collections of Decisions, but also by reference to Mr. Morrison's Dictionary. Some additional forms of the lease and heads of clauses will be found in the Appendix.

The Editor is aware that this attempt is attended with considerable responsibility; and although the additions which have been made are almost invariably supported, either by the decisions of the Court of Session, or by approved authorities in Scots law, yet, should it happen, that in some instances these authorities have been misapprehended or misapplied, or should omissions be discovered, he trusts, that his inexperience, and the difficulty of the task, will entitle him to some indulgence.

W. B.

EDINBURGH, Sept. 1820.

[DEDICATION TO SECOND EDITION.]

TO

SIR ADAM FERGUSON, BART.

OF KILKERRAN,

THIS TREATISE

IS RESPECTFULLY INSCRIBED BY

THE AUTHOR.



PREFACE.

THE relative situation of landlord and tenant has undergone a very material change. Anciently the lease was more an agreement for mutual protection and defence, than an agricultural contract; its principal use was to express the consent of the proprietor that the tenant should have possession of his land: and instead of a mutual deed binding on both parties, it was a mere grant to the tenant, whose acceptance was never doubted. The tenant of those days had no capital to employ; the trifling improvements he was able to make were insufficient to give importance to his rights; and, in these circumstances, it is no matter of surprise that the disposal or alienation of his right to possess the land should have been denied to him.

THE modern contract of lease is very different. The tenant, bringing with him capital, skill, and industry, concerts with the proprietor a plan of operations from which a profit is to arise, the subject of fair divi-

sion between them, in proportion to the contributions of each. The interest of the tenant, under such an arrangement, is very different from that of the tenant under the old lease; and sound policy concurs with individual justice in securing to him the rights, and powers, and privileges for which he stipulates, as well as in holding him bound to fulfil the engagements which he undertakes.

MANY of the decisions, by which the legal rights arising from the lease have been established, were pronounced under impressions so different from those of the present day, that they scarcely can be expected to quadrate with the nature of the modern contract. But the parties to a contract are, to a certain extent, their own legislators, and the lease must, in its daily renewals, receive new forms and fresh powers, sufficient to work off whatever experience may prove to be hurtful or inconsistent with its nature. Fortunately for this country, the lease has never been entangled with our land rights, nor complicated with any other branch of our conveyancing. It has not, as in England, been used as a method of permanently transferring land, or of securing the provisions in marriage contracts, or in family settlements. The lease is, with

us, a contract relating only to the temporary possession of land; the regulations it contains are directed to the purposes of agriculture alone; and in the modification of its conditions, or the interpretation of its terms, there can be no restraint from an apprehension of danger to any other department of the law. It is of infinite importance, too, that a deed so necessary to the increasing riches and prosperity of the country, can in no shape be affected by any political arrangements.

At the point of improvement to which the lease has attained, and at a period when every exertion is making to promote the improvement of agriculture, an attempt to explain that contract, on the faith of which every valuable agricultural exertion must in a great measure depend—to show the effect of the common stipulations—the rights resulting from the conditions of the lease, or enjoyed by both parties at common law, cannot be wholly uninteresting, nor without its use.

In arranging and modelling the terms of the lease, in such a manner as to counteract the operation of the old opinions, and in adapting it to the various purposes to which this contract may be turned, a knowledge not merely of law and of forms is

required, but an acquaintance also with the practice and principles of agriculture. It is from the union of these that this contract is to be improved to the utmost, and to acquire its full and natural powers. In these objects, the interest of the landlord are combined with those of the tenant, since none of the consequences resulting from this contract can seriously affect one of the parties, without being felt by the other: no permanent cause of loss can affect the tenant, that will not reach also to the landlord; no permanent advantage can be secured to the tenant, of which the landlord will not enjoy his full share.

I SHALL have the comfort of thinking that I have not laboured in vain, if, in the following pages, I have been so fortunate as to convey to those who are better acquainted with agriculture than with law, a clear notion of the legal rights of landlord and tenant, and such views of the various points to which, at entering into a lease, the attention of the parties should be turned, as may enable them, with confidence and discrimination (surely not unattainable in a matter of plain common sense), to direct the proper conditions and stipulations of the contract.

Edinburgh, Nov. 1805.

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OF LEASES.

THE object of this Work is to explain the nature of that contract between landlord and tenant, by which the temporary use and possession of land is given for a yearly rent. With this view, I shall endeavour to give some notion of the history of this deed, and to bring fully before the reader, whatever relates to its constitution—the rights which arise from it—and the actions by which those rights are to be enforced: in treating of this subject, I shall observe the following arrangement:

I. I shall give some account of the progress of the lease, prior to the period at which it appears in the authorities of our law.

II. I shall consider the statutory and other requisites by which the lease is affected.

III. I shall then endeavour, in a commentary on the form of the lease, to explain the nature of the contract, with all the variety of regulations and conditions which the views of landlords and tenants, the peculiarities of their situation, or the state and condition of the farm may require.

IV. I shall conclude this part of the subject with an inquiry into the effect which, in various circumstances, is given to verbal or informal leases.

V. Proceeding then to the rights arising from the lease, I shall endeavour to explain the different interests of the landlord and tenant.

VI. The means by which the tenant's right may be transferred to purchasers or creditors. And,

VII. The rules of succession by which it descends to his heirs.

VIII. The treatise will properly be concluded with a discussion of the forms of actions competent to either party.

CHAP. I.

OF THE ANCIENT STATE OF THE LEASE.

IT has generally been supposed that the connection between landlord and tenant has gradually improved, from that between master and slave, to a state of total independence, and of mutual interest in the soil; and much ingenuity has been displayed in tracing this progress, and explaining the motives by which the parties may be supposed to have been actuated.

This notion has been illustrated by Lord Kaimes, with his usual ingenuity. Assuming, as the basis of his hypothesis, a state of slavery, in which he supposes the husbandman to have been originally placed, he has, by a train of suppositions, so natural, and so well connected, that they almost win our assent, attempted to lead us down from the first dawn of this connection, to the appearance which the modern contract of lease has assumed.*

But if we investigate the history of the lease, by an examination of the records and monuments of the middle ages, we shall discover facts, not indeed disposed in that harmonious order to which theory owes so much of its charm, but compen-

* "Lands originally were occupied by bondmen, who were the property of the landlord, and consequently were not capable to hold any property of their own; but such persons who had no interest to be industrious, and who were under no compulsion when not under the eye of their master, were generally lazy, and always careless. This made it eligible to have a free man to manage the farm, who, probably at first, got some acres set apart to him for his maintenance and wages. But this not being a sufficient spur to industry, it was found a salutary measure to assume this man as a partner, by communicating to him a proportion of the product, in place of wages, by which he came to manage for his own interest as well as that of his master. The next step had still a better effect, entitling the master to a yearly quantity certain, and the overplus to remain with the servant. By this contract, the benefit of the servant's industry accresced wholly to himself, and his indolence or ignorance hurt himself alone. One further step was necessary to bring this contract to its due perfection, which is, to give the servant a lease for years, without which he is not secure that his industry will turn to his own profit. By a contract in these terms he acquired the name of tenant, because he was entitled to hold the possession for years certain." *Kaimes' Hist. Law Trac. Securities on land, &c.*

sating for the want, by the satisfactory nature of the evidence, by which they are supported, and leading to a conclusion totally different from that to which Lord Kaim has come.

This inquiry naturally leads us to examine in what manner land was possessed, during that period in which we are taught to believe that no other orders of men existed but those of soldier and slave. On the irruption of the Barbarians, the Provincials were not entirely dispossessed; part of their property was preserved to them; they were permitted to choose whether they would live under the Roman law, or under the law of their conquerors; hence the manners and customs, and deeds and laws of the empire, would be communicated to the new proprietors.*

The conquerors, in their new seats, preserved their original manners; and those bands of friends and dependants, which form so peculiar a trait in their history, still continued to surround the chief. To those friends beneficiary grants were given; though this was not universally the case, the connection between the chief and the retainer subsisting, in many instances, without the intervention of land. Those beneficiary grants

* See the title *Sons* in the *Glossaries*—The *Abbé de Marly* seems to think that this rule was not followed by the Franks, yet he relies on a law which affords evidence that the Provincials were permitted to retain property and to bear rank. Further, it appears from the deeds of those times, as well as from an ordinance of Chas. II. art. 4. that the Franks retained their laws, and of course the forms of their deeds, in the midst of their conquerors.

are not to be confounded with the allodial property in the nation, nor with the fiefs which took their rise at a subsequent period, in the progress of this people: They were rights revocable at the pleasure of the granter, or they endured for the life of the receiver only; and the return consisted in services to be performed in the field, or in the Hall of the Chief, or in rents payable in corn, or in cattle, or in the performance of agricultural services.*

To form a just notion of a Roman province after the irruption of the Barbarians, we must conceive the territory to have been divided amongst the conquerors and the conquered: the whole forming what has been called allodial property, with the exception of those grants, which were made by the chiefs to their dependants, termed beneficiary rights, and held at the will of the granters. Under such circumstances, the lease must have been common among the ancient inhabitants, while the wants of the new possessors, and their ignorance of agriculture, must have rendered that contract equally acceptable to them.

* The opinion that the connection between the chief and the retainer subsisted without the intervention of land, is held by MONTESQUIEU, as well as by an author, who, resting his opinion on the evidence of laws and deeds, is entitled to the highest credit—MURATORI, p. 546, B. p. 332, D.—For the nature of the original beneficiary rights, see MABLY, L. 1. ch. 6. p. 163; MURATORI, p. 154, A. and for the existence of allodial property we may have recourse to a Charter of CHARLES the Gross, A. D. 887.—LEG. CONRAD. I. A. D. 1037, and to MURATORI, p. 636, D.

That lands at this time, and even at a later period, after the beneficiary rights had changed their nature, and from temporary, had become permanent rights to land, were held for the payment of rent, is established by the deeds of those days, particularly by the leases of Church lands. The property of the church had become immense, from the powerful influence which the clergy had acquired over the minds of men. This influence they owed to the doctrines of purgatory and of atonement, and to the belief so carefully inculcated, that the termination of all things was at hand. The property which, by such means, was thrown into the possession of the church, was given out on lease for payment of rent. There were also other means by which the property of the church was increased. The clergy possessed privileges and immunities which extended to their vassals and dependants, and yielded a sanctuary, to which the less warlike, or less powerful proprietors fled for safety, resigning their property into the hands of the church, and receiving it back on payment of rent, higher or lower, according to circumstances; "*Alibi monui (says Muratori) rursus heic repetendum censeo, fuisse olim complures, qui ut publicis oneribus se suaque eximerent, sacris locis bona sua largiebantur eaque continuo ab ipsis sub tenuissimo censu in Emphyteusim recipiebant.*" The deed by which this was accomplished, was termed *precaria*,* *prestaria*, *libellum*,

* I shall give the form of the *Precaria* from Du Cange. "*Consuetudo et Justitia Ecclesiastica est, ut qui res suas et facultates suas*

or locatio. There are no examples of such deeds in the records of this country, but there are vestiges in our acts of Parliament, which prove that such deeds were actually in use—thus, by the statutes of Robert I. c. 1. § 1. it is enacted, “That it
 “is not leisome to give land to any Religious
 “House, and thereafter to take it back againe
 “to be halden of the samine Religious House.”
 § 2. “It is not leisome to anie Religious House
 “to receive anie lands in sic an manner frae anie
 “man, and to give the samine back again, to be
 “halden of them, be him quha gave them.” These enactments obviously relate to deeds similar to those which were in use on the Continent, and they prove that the forms of conveyancing observed by the Church, were the same in all the countries of Europe.

“Deo servisque suis contulerit, ei aliquid, quod postulaverit,
 “rationabiliter ad invicem de rebus Ecclesie conferat. Ideo Ego
 “Barnoinus Archiepiscopus Ecclesie Viennensis, una cum Sacer-
 “dotibus et Clericis ejusdem sancte matris Ecclesie, concedimus
 “tibi Randuico et uxori tue Raingardi eandem colonicam, quam
 “per instrumenta cartarum Ecclesie S. Mauricii contulistis, que
 “est sita, &c. Et pro hac tam pia consolatione et grata devotione
 “concedimus vobis ex rebus S. Mauricii vel S. Symphoriani presta-
 “tione beneficii in madrata mansos vestitos duos, et absos 13. ut
 “faciatis ex his omnibus diebus vite vestre quicquid vobis juste
 “et rationabiliter visum fuerit. Ea tamen conditione, ut easdem
 “res edificetis et melioretis atque excolatis, et annis singulis festi-
 “vitate S. Mauricii in vestitura modium frumenti et modium vini
 “Ministris S. Mauricii persolvere studeatis: et post discessum
 “hujus vite vestrum, absque alicujus contradictione predictae res,
 “et quas de jure nostro Ecclesie traditis, et easdem quas Ecclesie
 “vobis confert, Sancti Mauricii Ecclesia recipere valeat,” &c.

It would be idle to enter minutely into the forms of these deeds. I shall content myself with observing, that they agree in the following particulars: * 1. That the lands are given out by the Church to be occupied by a person who in general has a temporary right only. 2. That the subject must be properly occupied, and regularly laboured. 3. That a rent is payable annually by the possessor; and *lastly*, That the possession of the tenant is declared to depend on the regular payment of the rent. The deeds appear in the form of a charter; and they are granted by the proprietor to the person who is to possess. The endurance and nature of the right is expressed, and the rents or services to be performed are enumerated. † To this the proprietor trusted for the performance of the obligation on the tenant, and

* See MURATORI, Dissert. II. mo.—BIGNONIUS's Notes on Marculfus—and DU CANGE.

† These reddenda bear a strong resemblance to the reddenda of the charter of which Muratori takes notice. After remarking that in feudal grants, a small annual tribute is imposed in evidence of the vassalage, as a pair of spurs, a hawk, or hawk-bell, he proceeds in these words: "Non dissimiles fuerunt interdum census Emphyteusibus impositi, nisi quod aliquid lepidi quandoque in iis præscribendis immiscebatur;" he then gives instances of these reddenda, of which I shall insert one or two as examples. "Bononie emphyteusis a monachis Benedictinis Sancti Præculi constituta, pro Censu fumum cappenis cocti reddebat; hoc est, annis singulis stato die ad mensam Abbatis Emphyteuta accedebat, capponem e ferventi aqua tractum et duobus patinis inclusum deferens quem exinde detegebat, ita ut demum fumus ascenderet; quo peracto ille abibat, ferculum ipsum asportans, et satie suo munere functus." Another is mentioned in these words, "Prims die Maii cuiusdam, Emphyteusum ab Orphanis Lucensibus habentibus."

there are still preserved ancient decrees, by which it appears that the Judges reduced the right of the tenant where he appeared to have wasted the ground, or to have infringed the conditions of the right.*

That the form of the lease was known in ancient Gaul, while a Roman province, will not be denied. That this contract was retained by the Church Courts, will also be admitted; and it is

"ti, id onus incumbit, ut ad eos arberem Majalem † deferat (non
"majo appellamus, in quo reliquias adhuc cernimus celeberrime
"apud Ethnicos festivitatis cui majuma nomen) non paucis tētiis
"ornatam, annexis tribus pictis frumentis. Si iste abessant Em-
"phyteuta a beneficii possessione statim deciderat. Quare opus est
"terram in aprico positam diligenter excolere, eamque adhibere
"curam, ne unquam eo die spicæ tritici desiderentur." In this
there seems to have been some object, and the attention of the ten-
nant would naturally be turned to the cultivation of his fields. But
I shall add one more, as a strange instance of the whim and vanity
of those times. "Ruralem quamdam confraternita tem nescio quis
"sacerdos heredem sibi instituit, ea conditione adjecta, ut effigiem
"suam in tabula pictam perpetuo ibi custodirent, Annis singulis,
"recurrente stato die, opus est sigillatim, nomine et cognomine ex-
"presso, sodales eos in aula congregatos interrogare, ad adsint. In-
"terrogandus quoque est idem Presbyter, tamdiu postremo fate-
"functus. Tunc ex adstantibus unus respondet: *non adest*. quia
"audiens alter, in hæc verba erumpit; *quare non adest? En il-*
"*lum: Inspicite*; et pictam in tabella ejus faciem ostendit."

* I give in the Appendix, an example of a decree of this kind.

† MAJUMA festum quod summis impensis, conviviis et spectaculis,
isque indécoris ac procacis licentia celebrabatur, quodque primo ab
Arcadio toleratum (seu restitutum) ea conditione, ut honestas et vere-
cundia servaretur, deinde triennio post, et quod excurrit, prorsus pro-
hibitum. *Du Cange.*

Matur arbor maialis, seu quæ primo die Mali mensis origi solet in
compitiis vel ad ades magnatum, nostris *May*. *Du Cange.*

obvious, that the forms of the Church were, in all its establishments, the same; its conveyancers were educated in the same school. Besides, our ancient law proves that the resignation of property in favour of the Church, to be received back on lease, was as prevalent here as on the Continent. But an idea has been entertained, that anciently the cultivation of the ground was carried on by slaves only—It is no doubt true, that slavery existed, but it is equally certain, that there were also free men, by whom the land was laboured—On this point, a few remarks may be offered.

The labour of the Romans was carried on by slaves, slavery was also known to the ancient Germans, as we learn from Tacitus, “*Servis non in nostrum morem descriptis per familiam ministeriis utuntur. suam quisque sedem, suos penates regit: frumenti modum dominus, aut pecoris, aut vestis, vel colono injungit; et servus hactenus paret.*” Tacitus is thought to have described a class of men holding the place of the *adscripti glebæ* of latter times; for Du Cange observes, “*quibus quidem verbis satis designantur ejusmodi servi quos adscriptitios glebæ vocabant quales ferme fuere apud nostros, qui servorum nomine censebantur.*”

Those slaves were anciently distinguished by different names, as *Originarii*, *Capitales*, *Nativi*.—*Originarii*, we are told by Du Cange were *Servi glebæ adicti*, *adscriptitii*, a *prima origine colonariæ conditionis adstricti*. Under the title *Originarii* we have this description. “*Telles servitudes*

“ soient ramenées á franchise, et á tous ceux qui
 “ de ourine et ancienneté ou de nouvel par ma-
 “ riage ou par residence de lieux de serve condition
 “ sont encheus ou porroient encheoir ou lieu de
 “ servitude,” &c. Obnoxatio was a term also
 applied to a certain description of slaves, and in-
 cluded those who voluntarily gave up their li-
 berty. “ Si liber homo spontanea voluntate, vel
 “ forte necessitate, coactus, nobili, seu libero, seu
 “ etiam lito in personam et servitium liti se sub-
 “ diderit,” &c.; and the term Capitalis was ap-
 plied to those who were due an annual payment
 or capitation-tax, “ Capitales homines,” says Du
 Cange, are those “ qui debent censum de capite.”

But we have a much clearer account of this
 description of men in the Regiam Majestatem,
 B. II. c. 11. and in the Quon. Attach. c. 56. § 5.
 “ There is sundrie kinds of nativity or bondage,
 “ for some are born bondmen, or natives of their
 “ guidsher and grandsher, quhom the Lord may
 “ challenge to be his natural natives, be names
 “ of their progenitors, gif they be known; sic as
 “ the names of the father, guidsher, and grandsher
 “ of them quha are challenged, &c. Sec. 6. Item.
 “ there is another kind of bondage like unto the
 “ former, quhen ane stranger receives servile land
 “ fre ane Lord, and does servile service for that
 “ land, and deceases dwelland upon that land,
 “ and his son likewise deceases in the samin
 “ land, and after him his son lives and dwells in
 “ the land, and then deceases, all his posterity,
 “ till the fourth degree, sall be of servile condi-

“ tion to the Lord. Sec. 7, The third kind of
 “ nativity or bondage is, where an free man, to the
 “ end he may have the maintenance of an great
 “ and potent man, renders himself to be his bond-
 “ man in his court be the hair of his forehead.”

The slavery which prevailed in this country corresponds in every particular with that which existed on the Continent, the same distinctions were recognised, and even the form by which the free man gave up his liberty, was followed here. This appears from the ceremony of presenting himself in Court, and resigning his liberty by the hair of his head, and from that of placing his head on the altar in the resignation to the Church. Under the title *Capellæ* in the Glossary, we find further evidences of this, and also of other points of resemblance, when we compare what is said under the title *Servus* with the 12th chap. of the 2d Book of the *Regiam Majestatem*. I shall only add two enactments which relate to the freedom acquired by residence in a borough, to prove that in every branch of the subject, the policy of this and of foreign countries precisely corresponded; chap. 17. of the Baron laws runs in these terms, “ Gif ane bondman of an Earl or
 “ Baron, or of any other man, comes to ane burgh,
 “ and buyes to himself ane burgage, and dwells in
 “ that Burgh ane year and a day without anie chal-
 “ lenge from his master, or bailie, he sall be ever
 “ free, and sall enjoy the liberty of the burgh as
 “ ane burgess.” Similar to this, is the enact-
 ment, of the Emperor Frederick the II. in

1230, " Si homo qui censualis dicitur continu-
 " am fecerit in civitate residentiam, jura civi-
 " tatis conservando in dandis collectis et aliis
 " quæ a civibus statuuntur: nulla postmodum ex
 " hibebit Domino servitia per coactionem, sed
 " tantummodo persolvat censum."

In leaving this subject, one passage from the
 Quon. Attach. chap. 56, § 7. may be quoted as
 explanatory of that species of offence which a
 modern court of honour would reckon the highest;
 " and when any man is adjudged and decerned
 " to be native, or bondsman to any maister, the
 " maister, may take him by the nose and reduce
 " him to his former slavery;" so that this act in
 ancient times was symbolical of the lowest state
 of degradation.

While we must be satisfied, therefore, that sla-
 very was known here as well as on the Continent,
 it may, safely be concluded, that, as on the Con-
 tinent, there certainly did exist leases during the
 middle ages, and, of course, that there must have
 been free labourers of the ground; so in this coun-
 try, we must likewise have had leases and free la-
 bourers. But without resting on an argument
 from analogy, I shall proceed to state the evi-
 dence which our ancient laws afford, in support of
 the opinion, that while slavery was known in this
 country, we had also tenants or free labourers of
 the ground.

The feu-holding was a perpetual lease, in which
 land was given out for a certain rent. It was
 early received into our practice, and we find it re-

cognised in the Burrow laws attributed to David I. This of course draws it back to the 11th or 12th century. Chap. 100. of the Burrow laws provides for the case of a sale by a person holding lands in feu farm, and it gives the right of purchasing to the person who set them in feu. The feuar is in all our acts, termed the tenant, and the feuduty was, in most cases, the real rent of the land at that time.

But independently of this evidence, if we look into any of the regulations of those days, in which it was possible to take notice of the farmers or possessors of the ground, we shall find this order of men constantly mentioned. Thus, in the laws of King William (who began his reign in 1165,) C. 9th, is entitled "The *Law of Mills*." It is there ordered, § 3, "ane husbandman and ane farmer sall gif the thritten veschell of their lands of service, and mairver of ane chalder, ane firloft for knaveship." Sec. 7, declares, "gif anie man, in anie barony, takes land to ane certain terme for ferme, and after the term will flit and remove, he sall have his seed free fre multure," &c. And again, § 9, "gif a farmer renounces and gives up his land to his maister," &c. These passages are descriptive of a class of men possessing their lands for rent, entitled to the produce of the lands, and holding by a tenure which enabled them to renounce their possession at pleasure.

The statutes of the same King, Chap. 33, order the Earls, Barons, and Freeholders of the realm

“ to live as maisters and lords on their own landes,
 “ and fermies, and not as husbandmen or pastours,
 “ wasting their landes and the countrie with mul-
 “ titude of sheep and beasts, thereby trubling
 “ God’s people with skairsness, povertie, and ou-
 “ ter hairschip.” This regulation gives us a view
 of the state of the country at that time. The
 great proprietors had lands in their natural pos-
 session, they also drew rents which must have
 been paid by the husbandmen or tenants, who are
 here described as suffering from the numerous
 flocks and herds which the great proprietors spread
 over the country.

The 2d law enacted by Alexander the II. in
 the 1214, orders “ all husbandmen in the samen
 “ places and towns in the quhilk the zear begane,
 “ they have remained and dwelled in the samen
 “ places this zear, sall labour and use husband-
 “ rie, and sall nawise stay to use their owne pro-
 “ fite, and sall begin fifteen days before Candil-
 “ mas to teill and saw their landes.” The other
 enactments of this statute relate to every descrip-
 tion of country people, and point out the manner
 in which all who are capable shall apply themselves
 to labour.

In the form of the Baron courts we find it de-
 clared, C. 48. “ That na mail-man nor fermour
 “ may thirl his lord of his free tenement, although
 “ he, within his time, have done thirl service not
 “ aught be him. The whilk service the lord of
 “ the tenement is not holden to thereafter,” &c.
 In short, on every occasion where we can expect

to find any notice taken of the farmer in our ancient laws, we find him in the very state in which he now is, till at last we come down to the act 1449, C. 18, which was enacted for the benefit of *poor labourers of the ground*, and which has had the effect of rendering the tenant's right *real*, and effectual against a singular successor.

It is clear, therefore, that although slavery was known here as well as in other quarters of Europe, yet there also existed a description of men by whom the land was laboured, who laboured for themselves, and who held their lands under lease.

Let us now attend to the state of our land rights, and, in order to form a just notion of the landholders or Barons of this country, we must conceive their Baronies to be occupied by feuars and tenants who possessed without any written title. I speak at present of the general state of the country at a remote period, and I except from this view the property of the Church. Craig, speaking of the proper investiture, says, "*Hujus nostræ observationis exempla adhuc habemus apud nos; neque enim omnia antiquitatis vestigia adhuc exoleverunt; nam in limitaneis regni partibus, et inter montanos, nostro ævo, propriam investituram retinebant, cum Dominus in loco feudi constitutus, vel lapide, vel fasce graminis, vel baculo, possessionem tradebat sine scripto, presentibus tantum ejusdem Baronie, sive domini, si non Paribus, saltem accolis.*" Craig speaks here of what fell within his own knowledge, and he died 1608. He adds, "*In locis mediterraneis, his quingentis*

“ annis elapsis Breve testatum, quod nos Chartam
 “ dicimus, soliti sunt vassali a dominis suis acci-
 “ pere, quo se investiisse vassalum, eique jus et
 “ possessionem tribuisse, domini significabant.”

We shall not, therefore, wonder to find, at a period 200 years earlier, the following enactment; Stat. Robert III. C. 36. “ Gif the tenant affirms
 “ that he has not, nor ever had ane charter of that
 “ land, nor ever saw a charter of it, gif he speaks
 “ trulie not concealand the charter, in that case
 “ inquisition shall be taken be ane assise in quhat
 “ manner he sould hald that land; and that de-
 “ termination of the assise sall stand to him for
 “ a charter.” We have thus evidence, both from the opinion of Craig, and from the enactments of the legislature, that anciently a written title was not necessary for constituting the right even of a vassal.

Those rights depended on the evidence of the *pares curiæ*: a man was received and put into the possession of certain lands, to be held by him, for military service, that is to be held ward (the military tenure of this country)—or he received his lands to be held in feu, for payment of a certain feu duty—or he received them to be held for a certain period, or at the will of the proprietor, for payment of a rent; and in all of these cases the possession and the nature of the right were left to the evidence of the *pares curiæ*.

This being the condition of the ancient landholders of this country, it will now be proper to inquire what the difference was between a person

holding lands in feu for payment of a feu duty, and one possessing as a tenant for payment of a rent. The feu duty and the rent corresponded; both of them consisted either of victual or cattle, or of agricultural services; and it is only in the endurance of the right that any difference is to be discovered.

The 36th Act of the 11th Parliament of James the VI. provides, that "All rentals set be onie our Sovereign Lords predecessors of gude memory, of anie lands pertaining in property to his Heighness (except feu rentals set to men and their heirs) sall have nae farther strength or effect nor ane naked liferent, and that after the death of the rentallers his Majestie hath power to set, use, and dispose thereupon at pleasure, of new, in feu, either for augmentation of the former rental, or for new entres silver." This enactment supports the conjecture, that the only difference between the feu and the lease consisted in the endurance: The rental, when it was given to a man and his heirs, or in perpetuity, was a feu right—when given simply to the rentaller, it was a liferent lease.

When the rights of parties began to be expressed in writing, the feu-holder as well as the ward-holder obtained a charter, on which investiture was taken; and thus the modern investiture of an absolute right to land stands on the charter and sasine alone. The lease also was reduced into writing, and took the form of the charter, with this difference, that its endurance was limited;

Stair says, that "Of old, the lease was granted without any mutual engagement on the tacksmen like unto a charter." It contained a dispositive clause, a *tenendas*, and *reddendo*; and although our modern lease has lost the resemblance to the charter, we can trace it still in the English lease, and in the rental right when reduced to writing. At this time the connexion between landlord and tenant, appears to have been considered as chiefly favourable for the tenant, and the written evidence of it was therefore intended for his security. As ancient manners gave way, and the influence of commerce and of agriculture increased, the landlord no longer felt that dependence on the tenant which secured him in his right; lands were set to those who offered the best rent; the law, in place of securing the tenant merely, came now to afford security to the landlord also, and this the unilateral form of the lease, formerly in use, was incapable of doing. According to Stair, "by the old form, the tenant might, at the end of any year, before Whitsunday, renounce such a tack, and be free, as being in his favour; and therefore they are now ordinarily by way of contract, whereby the tacksman as well as the setter is obliged to stand thereto." It was in this manner that the lease came to assume the form of a mutual contract, binding on both parties.

At this period the tenants' right must frequently have come in competition with that

^a Stair, B. II. tit. ix. § 5.

^b Ibid.

of a purchaser; and the lease being a mere personal obligation, could not compete with the purchaser's real right constituted by charter and sasine. It was to put the two rights on the same footing that sasine was taken on the lease. When this practice was first introduced, the device certainly must have been sustained; but although the expense, which would thus be incurred, might in certain cases be submitted to, the custom could not have become general, because the profits of an ordinary farm could not in those times have borne the expense of that method of constituting, transmitting, and extinguishing the right. In fact, the tenants were not secured. This produced the act 1449, C. 18. which, from favour to the poor labourers of the ground, secured them in the possession of their farms, during the period of their leases. M'Kenzie, in his observations on the act, says, "The reason they used sasine before the act, was to make the tack real, and to defend against singular successors; this was no more used after the act of Parliament, which makes the tack a real right." This brings the history of the lease down to the period at which that contract begins to be recognised by the authorities of our law.

In these observations, I have endeavoured to give such a notion of the ancient lease, as the very imperfect state of the records, and the slender materials we possess for such a history, will permit.—What has been said authorises us to dissent from the hypothesis, which, assuming the slavery of

the bondsmen as its basis, represents the progress of the lease as the natural result of a recovery from that state. The lease, we have found, was introduced by the Romans, and was in use during the times of the Empire, and has continued, with no very essential alterations, until the present time. Its form was preserved by the Churchmen, whose notaries, having succeeded to those of the Empire, transmitted the Roman forms of deeds to the conveyancers of modern Europe.

CHAP. II.

OF THE LEASE AS AFFECTED BY STATUTE.

OF THE SCOTTISH AND ENGLISH LEASE.

IN the preceding chapter I have endeavoured to give some notion of the ancient state of the lease: We are now to proceed to a period of its history, in which it is affected by regulations still in force, and in this view, we are led to compare the uses to which the deed has been applied in this country, with those which it has served in England.

The lease in Scotland has been, almost exclusively, confined to the object of securing the rights of landlord and tenant; whilst in England, it appears to have been applied to the constitution of mortgages and family settlements. "When by the statute of VIII. c. 15. the termor, (that is, he who is entitled to the term of years) was protected against fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages; continuing subject, however, to the same rules of succession, and with the same inferiority to freehold, as when they were little better than tenancies at the will of the landlord." It is not difficult to see how this has happened.

In England, the lease was held to be a Chattel interest, which went to the executor; but, at the same time, it gave to the tenant a claim for implement against the granter, and all deriving right from him; of course, it protected the tenant against a purchaser. In this country, although the tenant's right in the lease descended to his heir, and not to his executor, yet, according to the Scottish feudal law, the lease (when it came in competition with the right of a purchaser) was postponed to the superior title of charter and sasmine. In this respect, the security enjoyed by the Scottish was much inferior to that possessed by the English tenant.

^a Blackstone, B. II. c. ix.

But in another point, the balance turned in favour of the Scottish tenant; for a form of procedure had been permitted in the English courts; destructive, in one respect, of the interests of the tenant, to which there was nothing analogous in our law. This form is termed a "common recovery;" it is a mere fiction of law, by which a person, pretending to have a preferable title to the estate, enters a claim; and the proprietor, by fraud and collusion, making no defence, the claimant recovers the land, by sentence of law, on a title supposed to be preferable to that of the proprietor. The effect of this was, to vacate all grants which the proprietor might have made, and, of course, all his leases fell. In these actions of recovery, the tenant was not allowed to appear; and his interest, although effectual against a purchaser, and against all deriving right from his landlord, was not protected against a person who, in law, was held to possess under a title preferable to the landlord's, and who, in no shape, could be supposed to represent him, or be bound to implement his obligations. In Scotland, the right of the landlord could be taken away by a reduction only, a form of action, by which the person challenging the right, calls for production of the title deeds, and demands that they shall be set aside as forged, illegal, or defective. This reduction of the landlord's right, however, did not produce the same consequences as the recovery in England. It was not resorted to collusively, for the purpose of defeating the tenant's right, and even if it had, the attempt would have

proved unsuccessful. The tenant might have had the benefit of a possessory judgment, (peculiar to our law,) the effect of which would have been, that the purchaser would not have been entitled to eject the tenant *de plano*, but must have been under the necessity of bringing an action of removing against him, in which the tenant had a right, in defence of his lease, to urge every plea competent against the title of the new proprietor. The fictitious recovery of the English law, therefore, was a procedure unknown in our law, and from which the Scottish tenant had nothing to fear.

Such was the state of the lease in the two countries, when the Legislature of each interposed. The act 20. Henry VIII. c. 15. enabled the tenant (or tenant) to falsify all manner of recoveries had against him, as tenant of the freehold, on feigned and untrue titles. From that moment, the English lease possessed a degree of security and stability, which fitted it for those purposes to which, in practice, it has been applied. At common law, it was effectual against a purchaser, and now, by statute, it was defended against fictitious recoveries.

The Scottish lease had nothing to apprehend from *recoveries*; but having no effect against a purchaser possessing a feudal title, it was exposed to destruction by a sale of the lands. This danger was provided against by the act 1449, c. 18. which secured to "the poor labourer of the ground," possession, during all the years of

his lease, provided he paid his rent to the new proprietor. The extent of this security, or, in other words, the effect of the Scottish lease as a real right, depends, therefore, entirely on this act; for it must not be forgotten, that, at common law, the lease is a personal right, which cannot stand in competition with a feudal right, constituted by charter and sasine.

If, to this distinction between the leases of the two countries, we add the effect produced on the Scottish lease by the escheat, and by ward-holding; (by the former of which, the right of the tenant might have been carried off, while, by the latter, it might have been suspended;) we shall perceive how it has happened that the lease, in this country, has been employed chiefly for the purpose of regulating the rights of landlord and tenant. The lease fell under the single escheat, by the tenant's remaining at the horn, unrelaxed, for a year;* and, in ward-holding, the right of

* Blowing a man to the horn, was the ancient form of seeking for an offender from county to county; and where he was not to be found, it was followed by outlawry. This was introduced into civil business; and, when a debtor refused to obey the King's letters, he was blown to the horn as an offender, and declared guilty of rebellion. It was on this ground that imprisonment proceeded, and the debtor was imprisoned as a rebel to the King. Part of the punishment which the weakness of government rendered necessary, was, the falling of the debtor's escheat, which, in a manner, armed one part of the kingdom against the other in favour of the laws; and when a man remained for a year under denunciation for rebellion, or, in technical language, at the horn, his life-tenement escheat fell, and was gifted at the pleasure of the Crown. It was by that most important statute, 20th Geo. II. c. 50. that the penal consequences of civil rebellion, as well as ward-holding, was abolished.

the tenant was suspended during the superiors' possession: nor was it until the act 20. Geo. II. c. 50. which abolished ward-holding and the penal effects of civil rebellion, that the lease was freed from these disadvantages: By this time, however, the forms of securities for debt, as well as of settlements, had been fully established, and, therefore, we need not wonder that no attempt was made to employ the lease for any of those purposes, to which, in England, it has been applied.

In order to understand properly the nature of the lease, in questions with the granter, and with purchasers, it will be necessary to consider,

1. The requisites of the act 1449.
2. The effect of a lease when protected by that act.
3. The effect of a lease, though not protected by the act, in questions with the granter, and those representing him.
4. The nature of a possessory judgment.

SECT. I.

THE REQUISITES OF THE ACT 1449. c. 18.*

In treating of the effect of this statute, there are several points, which it will be proper to consider in their order; as,

* "*The buyer of landes sould keepe the tacks set before the buying.*

" *ITEM, It is ordained, for the safetie and favour of the puir*

1. The nature of the lease to which the act applies.

2. The requisites of the lease in regard to rent, endurance, and possession.

1.—*The Nature of the Lease.*

1. It is obvious, that the act was intended to apply merely to the agricultural lease. It was enacted for the safety and favour of the poor people that labour the ground. But the importance of securing the rights of tenants in general, soon showed the propriety of extending the benefit of the statute to tacksmen of every description. Lord Stair says, that the act operates "in favour of all tacksmen, *whether they be labourers of the ground or not*, whereby tacks are now become "the most ordinary and important rights." His Lordship does not seem to consider any description of lease as *exempted or excluded* from the benefit of the act, and this view has of late been most extensively adopted.—"Custom," says Mr. Erskine, "has, from analogy, extended the enactment of the law to tacks of mills, and of annual-rent; *ex. gr.* salmon fishings, col-

" people that labouris the ground, that they, and all vtheris that hes
 " taken, or sall take, landes in time to come fra Lordis and hes
 " termes and zeires thereof, that suppose the Lordes sell or annaly
 " that land or landes, the takers sall remaine with theirtackes unto
 " the ischue of their termes, quhai, handes that ever thay landes
 " cum to, for siklike maill as they took them for."

^a Stair, B. II. tit. ix. § 2.

"liries, &c. and of such other subjects as are "*fundo annexa*." Mr. Erskine, however, proceeds to say, that tacks of houses within burgh are ineffectual against singular successors, not merely because they are not specified in the act, but because such tenements are generally let from year to year only; and, in support of this doctrine, he refers to a case which does not seem to be any authority on the subject at all: it is not even a decision. It appears from the report to have been a debate merely.^b But the point, may now be considered as settled without regard to the distinction taken by Mr. Erskine. In one case, a missive of lease of a burgage subject for seven years followed by possession, was held to be effectual against a purchaser.^c In another a very irregular missive of lease for two liferents, of an urban tenement, followed by possession, was sustained against a purchaser.^d

^a Ersk. B. II. tit. vi. § 27.

^b Rae, Fount. vol. I. p. 95. Kaims' Dict. vol. II. p. 417. Mor. p. 15216, and 10211. In this case, a tenant, who was in possession of a farm, received from his landlord a lease, to commence at the separation of the crop. Prior to this, however, an adjudging creditor of the landlord's obtained infestment; and the point discussed was, Whether this lease was good against the adjudging creditor? The question was, Whether the tenant's possession could be ascribed to the lease? and Lord Fountainhall closes his report by saying, "Many thought it only personal." From this, it rather would appear, that Lord Kaims must have made this entry in the Dictionary, with reference to some other case.

^c Waddel v. Brown, 10 Dec. 1794. Fac. Coll. Mor. p. 10309.

^d M'Arthur v. Simpson, 6 July 1804. Fac. Coll. Mor. page 15181.

There is one description of lease, however, which Mr. Erskine is clear does not fall under the protection of the statute; viz. a lease of rents: Where, for example, an estate is wholly set to tenants, and the proprietor gives to a third party a right to draw the rents from the respective tenants, for a rent payable by this interposed individual, such a lease is not protected against purchasers; because, "such tacksman neither labours the ground, nor is indeed tenant of any land; but barely farmer of the rents and profits payable by the tenants on the estate."

There are other reasons why such a right ought not to affect a purchaser. It is a right which may be concealed, even where possession has followed on it; a thing which cannot happen in a lease entitled to the protection of the statute. Such a conveyance, indeed, can scarcely be considered as of the nature of a lease; it is rather a sort of general assignation to the rents, which could not prejudice a singular successor, even although the real leases upon the estate, upon which such a right must obviously depend, were to be held effectual. Besides this, in the event of a sale by the granter of such a right, it would be objectionable on the ground of fraud.

But it is decided law, that any lease, under which the tenant possesses lands, houses, mills, fishings, collieries, or whatever is *fundo*

* Ersk. B. II. tit. vi. § 27.

annexum, is entitled to the protection of the statute.

2. In order that the lease may enjoy the benefit of the act, it must be in writing. This arises from the nature of the right, which is a contract affecting land; and no right affecting land can be constituted without writing, the parties, where it is wanting, being entitled to resale. This is undoubted law, and was so held as far back as the time of *Durie*.* But how far the writing requires to be a formal deed, with all the requisites prescribed by our law, we shall have occasion to consider, when we come to treat of the effect of possession, following on an informal written lease.

2. *The Requisites of the Lease, in respect to Rent, Endurance, and Possession.*

1. RENT. The payment of rent is essential to the nature of a lease; and, accordingly, there are many cases, where no rent having been stipulated, it was questioned, whether it could be held that there was a lease. Lord Kaimes has noted some such instances; as in the case of a tack, set by a husband to his wife, for her lifetime; which was

* *Keith v. Johnstons*, 16th July 1636. Mor. p. 8400. Skene, 15th July 1637. Mor. p. 8401.

found to be null, at the instance of the husband's heir, 'because it contained no tack-duty:'^a Another, of a lease in which there was no yearly rent, and which was allowed to subsist, until reduced by way of action, merely in consideration of the landlord's having acknowledged that he had received a large sum for the lease from the tackman:^b—Perhaps, in a question with the granter, or his heirs, this lease ought to have been effectual; but the decision tends, at least, to show the rule of law, that a lease, in order to be effectual, must have a stipulated yearly rent.

The difference between the question, when it occurs with the heir of the granter, and when it occurs with a singular successor, is evident; and the want of a stipulation for payment of rent, though not fatal to the lease, in a question with the granter, or his heirs, or his gratuitous disponees, will yet render it ineffectual when the estate comes into the hands of a purchaser. Indeed, in questions with purchasers, the stipulation of a rent is to be considered as a condition of the contract. This seems to be implied in the act, for it declares, that "the tenant shall remain, to the issue of his term, *for such like mail* as he took them "for."

The rent must be expressed; but it is not necessary that it should be in money; it may be in

^a Ld. Grange-Durham v. his Brother's Relict, 7th June 1575. Mor. p. 15165. Ld. Ayton v. Tenants, Durie, 7th July 1625. Mor. p. 15167, and 15476.

^b Lord Mellerstanes v. Hailie. June 1691. Mor. p. 15165.

grain, or services to be performed, as cutting down the landlord's corn, mowing his grass, carriages, &c.*; and Lord Kaims refers to a case, where a smith enjoyed a piece of ground during his life, on condition of his working the smith-work of the estate; it was found, that this was a lawful tack, that his work was *merces locationis*, and sufficient to maintain him in possession against a singular successor.^b

As the insertion of a stipulation for rent is required to render a lease effectual against a purchaser, it might seem to follow, that this rent ought to be fair and adequate, because, in so far as it is below the value of the land, there is no rent payable for part of the estate; and to hold that the lease were nevertheless effectual, would be to permit the estate, to that extent, to be carried off from the purchaser without recompense, by a person holding a right not secured by infestment or appearing on record. Where the purchaser has an opportunity of examining the leases, no great injury can arise, as he will proportion his offers to the rents. But the situation of an adjudging creditor is different, and by admitting any rent, however inadequate, to be a sufficient compliance with the act, it may seem that a great hardship is imposed upon him. This evil, however, is more than counterbalanced by those which would result from a contrary rule. Were it necessary that the

* Erskine, B. II. tit. vi. § 24.

^b Lundie v. The Smith of Lundie, 11th July 1610. Dict. vol. ii. p. 418. Mor. p. 15166.

stipulated rent should always bear a near proportion to the value of the subject let, and were a reduction of the lease competent where this was not the case, it might be doubted how far an improving lease of lands could ever be granted, or indeed any lease of a long endurance. The value of land is perpetually fluctuating, from events which no foresight can anticipate, and a lease, for an adequate rent at its commencement, might in a very few years expose the tenant to an action of reduction at the instance of the landlord's creditors, on the ground that the rent bears no proportion to the value of the farm. This is a state of uncertainty, for which the advantages resulting to creditors would obviously be no recompence. There are, therefore, both expediency and justice in the undoubted law laid down by Mr. Erskine, that the "tack-duty, though it should be below the true value, affords to the tenant an absolute security against removing." This, however, will not be extended so far as to protect the tenant, where the stipulated rent is merely elusory.

2. **ENDURANCE.** The act declares, that the tenant shall remain with his tack till the issue of his term; and it may be questioned, whether, under this provision, a lease, for a long period of endurance, would be effectual against a purchaser. This precise point has never been decided by the Court, and there are many circumstances that may occur to prevent it. In general, the purchaser

* Ersk. B. II. tit. vi. § 24.

peruses the leases, which, of course, enter into the view of the parties in the purchase: and the clause of warrandice in the disposition is commonly so expressed as to preclude the question: So that there are very few cases in which this point can occur; and it must, in a great measure, be owing to this, that we have no report of any case in which this question has come fairly to trial.

That there must be an “*ish*,” as it is called, in other words, that the lease must, in its endurance, be limited to a precise period, is necessary at common law, independently altogether of the statute. Thus, a tack set, *in perpetuum*, was found null, even at the instance of the granter’s representatives.* But to bring out the question respecting the legality of long leases, we must suppose the lease to be granted for a specific period, as for a thousand years. In such a case, the lease has an “*ish*” or termination; but shall the tenant and his heirs be entitled to possess until the expiration of that period?

In one case, a rental to endure, “*as long as the grass groweth up, or the water runneth down*,” was found to be effectual against the heir of the granter; but, in that case, it was expressly admitted in the pleadings, that it would not have been effectual against a purchaser, which so far indicates the opinion of lawyers on the subject at that time.^b It would appear, from a decision referred to in Lord Kaims’ Dictionary, that

* Stewart against Lord Garlies, July 15, 1615, Hope *voce* Tack, Mor. p. 15187.

^b Carruthers v. Irvine, 23d January 1717, Mor. 15185.

the question had been before the Court in 1730. "A tack (it is said) being set for an elusory tack-duty, and for an endurance of 2400 years, was found not to have the benefit of the act of parliament in favour of tenants, and therefore not good against singular successors." But in this case the elusory nature of the rent may have influenced the Court; and, in another, which case occurred at the distance of a few years, it does not seem to have been referred to as an authority upon the point of endurance. With regard to this last case, Lord Kilkerran says, "How far tacks would be effectual against singular successors, when granted for an unusual number of years, has been questioned; and this very session, there was an occasion given, at least, for understanding the mind of the Court upon it, which was this. The estate of Jordanhill was purchased at a judicial sale, by Alexander Houstoun, merchant in Glasgow, who having discovered, after the sale, that a small bit of ground, consisting of little more than an acre, was not the property of Jordanhill: That his right to it was no other than a tack of 400 years: He set forth the case in a petition to the Lords, and that he was willing to retain the subject, if it should be found to be an effectual tack, upon his being allowed a proper deduction. The case was stated by Lord Kaims, probationer;

* *Alison v. Ritchie*, 3d February 1730. Dict. II. p. 412. Mor. p. 15198.

“ as a part of his trial, who gave it as his opinion, that a tack of such endurance was not effectual against singular successors, but that it was good against the heirs of the granter; and, though there was no occasion to give judgment on that point, of its not being effectual against singular successors, the Lords appeared to approve of that opinion; but only found, that the lease, in this case, was effectual against the heirs of the granter, and remitted to the Ordinary to hear parties on what deduction might be insisted for, as it was not a right of property.”^a

This brings us down to the year 1752, at which time it was the opinion of the Court, that a lease, of an unusual endurance, is not effectual against a purchaser; and the decisions since that time, which seem to bear on the point, do not oppose this opinion.

The first case occurred at the distance of six years only. A lease was granted so far back as 1670, to the tenant, his heirs and assignees, renewable from 19 years to 19 years for the term of 1140 years. The tack contained a precept of sasine for infefting the tenant, on which infeft-

^a Purchasers and Creditors of *Jordanhill v. the Earl of Crawford*, 13th February 1752. *Kilk. voce Personal and Real*, No. 9. in *Note*. Mor. p. 10307. This case is more fully reported by Lord Elchies, who says, that the Judges “all agreed that the tack would not be effectual against singular successors, and that the act of parliament (1449, c. 18.) was only to be understood of tacks of ordinary endurance, otherwise it would render our records of no use.”—*Elchies’ Notes, voce TACK*, p. 446, and Decisions, *voce TACK*, No. 18.

ment followed, and the sasine was duly recorded. The successor of the granter of this lease was attainted for treason, and the tenant claimed from the crown the benefit of the lease. This case involved a special question arising from the state of the titles, as to how far the forfeiting person, and subsequently the crown could be held as representing the granter of the lease; and on the assumption, that they were to be held as singular successors, it came to be questioned, whether a lease with a *certain* termination, however remote, was to be held effectual against a singular successor, especially since, from a prevailing belief that such leases would enjoy the protection of the act 1449, c. 18. many such leases had been granted. The Court of Session held the tack to be good against the granter's heirs, but found that the forfeiting person, as being a singular successor, was not bound by it. This judgment, however, was reversed in the House of Lords, and the lease sustained.*

* *Fraser v. the King's Advocate*, 6th December 1758. Mor. p. 15196. The plea on the point of representation stood thus: It was stated for the Crown, that the late Lord Lovat was not heir to the person by whom the lease was granted, but possessed as a purchaser from Hugh Fraser, the great grandson of the granter; and that Hugh himself did not represent the granter; for Lord Hugh, the granter's son, possessed on apprising, and Hugh, the grandson, who conveyed the estate to the late Lord Lovat, possessed on singular titles. To this, it was answered for the tenant, That although Lord Lovat, the forfeiting person, purchased the estate from Hugh Fraser, yet he was bound, by an express article, to indemnify Hugh Fraser against the warrantice he should incur, in consequence of any challenge brought against the deeds of Hugh Fraser's predecessors: That Lord Hugh, the son of the granter, possessing the whole of the estate under an apprising of a small part, had in-

Had the question of endurance been the only one in the case, this would have been a decision of the House of Lords, finding, that a lease, whatever its endurance may be, is effectual against a purchaser. But this reversal appears to have proceeded on the ground, that the forfeiting person represented the granter, and, therefore, that the Crown, as coming in his place, was bound by the lease; so that this judgment cannot be regarded as affecting the principle of the decision in the Court of Session, refusing effect to a long lease against a singular successor. That the reversal proceeded on the special ground, is proved, not only by the state of the titles, but by the course of the argument in the subsequent case of the Earl of Hopeton, which was decided at the distance of three or four years only; and, had this been a decision on the general point,

curred a passive title; and Hugh, the grandson, did also incur a passive title, by granting a trust-bond to the late Lord Lovat for £30,000 Sterling, for the purpose of completing a title to the estate in Lord Lovat's person; and having adjudged the whole estate, and in particular the superiority, which remained in *hereditate jacente* of the granter of the tack, Lord Lovat paid £12,000 to Hugh Fraser, to discharge him of the trust; and, in this manner, Hugh Fraser subjected himself to a passive title as representing the granter of the lease, and was bound to fulfil his deeds; and Lord Lovat, the forfeiting person, being bound by his contract with this Hugh Fraser, to relieve him of any warrandice he might incur from the deeds of his predecessors, Lord Lovat was, in fact, bound to warrant the lease in question: and the Crown, as coming in his place, is barred from challenging the lease, especially as the late Lord Lovat had confirmed the lease, by receiving rent from the tenant for several years without challenge.

there can be no doubt that it would have been referred to in that case.*

* From an opinion of Mr. Ferguson of Pifour, which I am enabled to lay before the reader, it is obvious, that the representation of the forfeiting person was the ground on which the judgment of the Court of Session in Lovat's case was reversed. There had been two grounds on which a passive title might have been inferred: 1. That Hugh Fraser purchased adjudications affecting his predecessor's estate, which is a passive title under the act 1695. 2. That he gave a trust bond for £30,000, upon which the estate was adjudged, and this adjudication is the chief ground of the late Lovat's charter and infeftment 1738, which was the title of his possession. After some observations on the first of these, Mr. Ferguson proceeds in these words:—"The other, and the most substantial, passive title is, the adjudication on the trust bond of £30,000, for which he got £.12,000 from the late Lovat. I do not think that any solid answer has been made to this. The best that is offered is in the end of Mr. Pringle's answer to Belladrum's petition. But it is apparent he is labouring and greatly straitened. The chief objection is, that Hugh Fraser did not possess the estate on this trust adjudication. But it looks like a burlesque on the law, to suppose that he would have been liable if he had possessed, and yet not liable when he gives it to a purchaser to possess, and takes the price. If the question were an universal passive title, a slender distinction would be sufficient to relieve the apparent heir: But when it is only pleaded to make him liable *in valorem*, there is no equity to allow an heir to put the value of his predecessor's estate in his pocket, and dispute his ancestor's deeds:—Nay, it is still an easier step, to bar him from challenging his tacks or other deeds, than to make him liable to pay all his debts.

"It does not appear that any satisfying answer can be made to this; if it is shown that any material part of the estate remained in *hereditate jacente* of Lord Hugh, and was taken by the late Lovat, upon the adjudication, on a charge to enter heir to him, which could not have been taken out of the *hereditas jacens* of his son.

"This appears from the scheme subjoined to Mr. Johnston's remarks, dated December 5th 1757, by which it appears, that not only the barony of Lovat, Beaul, Abertarf, Aird, and

The Earl of Hopeton's case was decided in 1763, John Cockburn, the Earl's author, was proprietor of the Murray's, which he set in lease to Robert Wight, for the space of two 19 years, from Whitsunday 1718. This lease

" Strathglass, were contained in the infestment of Lord Hugh, who granted the tack, whereas, only some of the particular farms of these lands were contained in the apprisings acquired by Lord Hugh his son ; but also, there are sundry patronages mentioned in that list, No. 3, and many particular lands mentioned No. 7, which were contained in the granter's sasine 1663, and were not contained in apprisings acquired by his son. It can hardly be doubted, that the value of these subjects must far more than overbalance the value of this tack.

" Here it will be said, that Lord Hugh, the granter, was denuded in favour of his daughter. To which, the only answers that occur are: 1. That her title was cut off by prescription. 2. That the superiority still remained with him, which would be of great value.

" It is the more material to insist on the passive titles in this case, that, though it is very doubtful if so long a tack would even be sustained against purchasers, yet there seems to be little doubt it will be good against the heirs of the granter. And if Mr. Fraser, his great grandson, is proved to represent him above the value of the subject in question, and Lord Lovat, by the decree arbitral, liable to relieve him of that representation, the appellant may prevail, though the general point, as to long tacks being good against singular successors, were to go against him.

" And if the passive titles appear to be but probable, it will strongly confirm the plea of homologation against the late Lovat. Very slender acts will be sufficient to infer homologation of a deed, which one ought not to challenge."

Such is the opinion given by Mr. Ferguson, afterwards Lord Pitfour, in this case ; and it points out clearly the grounds of the decision in the House of Lords, as well as the very doubtful light in which the principle on which long leases are to be supported, appeared to this great lawyer.

contained a clause, obliging the granter, his heirs and successors, to iterate and renew the lease from 19 years to 19 years; the tenant paying, on each renewal, the sum of £100 Sterling, as a grassum; and the lease contains a clause of absolute warrandice. In the 1745, Cockburn disposed the estate to his son George for £21,745 Sterling, and the disposition contained a clause of absolute warrandice, with the exception of the existing leases of the lands, "without prejudice to the purchaser to quarrel and impugn the said tacks, on any ground or nullity in law, provided the same do not infer warrandice against me and my forebears." This estate was afterwards sold to the Earl of Hopeton, with a clause of warrandice expressed in the same manner, excepting that Wight's lease was specially described, in place of being referred to generally.

In the 1756, the two first 19 years of Wight's lease were to expire, and the heir of the tenant, being then a minor, his mother, who acted for him, had intimated to the Earl of Hopeton's factor the year preceding, that she was prepared to pay the grassum, on receiving a renewal of the lease for 19 years. In place of this, however, she was prevailed with, to take a new lease for 63 years, at the former rent, in name of the minor. When the minor came of age, he disapproved of the transaction entered into by his mother in his name, and brought a reduction of it.

The question stated for the Earl of Hopeton, was, Whether a lease, renewable from 19 years

to 19 years for ever, be effectual against a purchaser? But the tenant maintained, that the Earl was barred from entering on the general question by the clause of warrandice which he had admitted into his own title-deeds; and the "Court found, that Lord Hopeton, *although a singular successor*, was barred, *personali exceptione*, from objecting to the renewal of the lease, and found, that his Lordship was bound to grant a new lease, in terms of the obligation contained in the original lease; and to renew the same, at the expiry of every 19 years, on payment of the stipulated grassum of £100 Sterling."^a

In this decision, it is clearly implied, that had the Earl of Hopeton been a purchaser, unaffected by any such obligation as occurred here, he would not have been bound to give effect to the lease: the decision proceeding solely on the circumstance of his having barred himself from reducing any lease that might infer warrandice against the seller.

In another case, a lease from 19 years to 19 years, as long as the Tenant chose to possess and pay the rent, was sustained against a singular successor, but, in this case, there had been homologation for a great many years, by the pursuers' predecessors whom he represented.^b

Such, then, have been the cases in which this point came into question, and it seems to be a fair

^a Wight v. The Earl of Hopeton, 17th November 1763. Mor. p. 10461 and 15199.

^b Scott v. Straiton, 19 Feb. 1771. Fac. Coll. Mor. p. 15200.

inference from them, that the Court, in every case where they have had an opportunity of expressing an opinion, have thought that a lease of an unusual endurance would not affect a purchaser, unless he can be considered as barred from making the challenge, by special grounds, such as homologation of the lease, either by his own acts, or by the acts of those whom he represents, or that his right has been acquired under a knowledge of the lease.

But still a very considerable difficulty remains; for, upon what period shall the Court fix, beyond which they will not sustain a lease against a purchaser. Where a lease is stipulated to be renewed from period to period for ever, as in the Earl of Hopeton's case, there seems to be little doubt, that it is a lease which would not be sustained against a purchaser. In the same way, if it were made to endure until a certain sum should be paid,^a or as long as the tenant was able to pay the rent, it would not be effectual against a purchaser.^b But the difficulty is, where a precise period is fixed, to draw the line of distinction, for example, between a lease for 100 years and one for 19 years, "since" (according to the reasoning of the English law) "long or short are only terms of comparison; as, "a lease for 40 years is long with respect to one "for eight or ten, and yet, short, with respect to

^a Hardie, 1st December 1627, Auchinleck, *voce* TACK. Mor. 15190.

^b Hamilton *v.* Tenants. Durie, 2d March 1626. Mor. 15188.

“another of a hundred years.”* Were the question, therefore, to occur, the Court might find it a very difficult thing to give effect to a lease for 19 years, (which they would do in terms of the statute) and refuse effect to a lease of any greater precise period of endurance.

Having mentioned the authorities which bear on this question, it is sufficient to observe, that, although a lease for 19 years, or any ordinary period of endurance, would, under the statute, be effectual against a purchaser; yet, there is still an important case hitherto undecided, viz. the precise period beyond which a lease will not be sustained against a purchaser.

I am aware, indeed, that there are decisions in which leases of a long endurance have been sus-

* The reasoning here referred to, will be found in Bacon's Abridgement by Gwillim, vol. iii. p. 3. It is applied to prove the propriety of giving leases, of the longest endurance, to the same heirs, as in the case of a lease for a single year, the argument is this:—
 “It would be inconvenient to have had one rule of property for short terms, and another for those that were longer, being all of the same nature, and still no more than leases for years; besides the difficulty of fixing the just bounds to any precise determinate number of years; since one or two years more or less would have made very little difference in reason, and long or short are only terms of comparison; as, a lease for 40 years, is long with respect to one of eight or ten, and yet short, with respect to another of 100 years; therefore, that there might be an uniformity in the law, all leases for years are holden to be of less value than estates for life, as being originally of much shorter duration, and therefore are considered only as chattels, and cast upon the executors.”

tained.^a For example, leases for four 19 years, without the question ever having been moved, whether a lease of that endurance was entitled to the protection of the act. These cases, therefore, are not strictly authorities in point, but it is proper, on this occasion, to refer to them.

POSSESSION.—The statute declares, that tenants shall *remain with their tacks to the end of their terms*; which necessarily implies, that the tenant must be in possession; and, in fact, possession is required for giving effect to the lease, so that, in a competition betwixt two leases, the last lease, with the first possession, will be preferable.^b A lease, therefore, on which no possession has followed, cannot compete with the right of a purchaser, which is equivalent to saying; that possession must have taken place under the lease, in order to entitle the tenant to plead the benefit of the statute. This is supported by a case.^c The proprietor of an estate being desirous of giving his wife the lease of a farm, in the event of her surviving him, granted a lease to a third party for her behoof, which lease was to commence at the first term after the death of the granter;

^a Campbell v. Siller, November 30th, 1788. Mor. p. 15223, and Lealy v. Orme, March 2d, 1779. Mor. 15630.

^b Macmillan, 23d June 1697. Durie. Mer. 15229.

^c Johnston v. Cullen, 24th February 1676. Stair and Dickson. Mor. 15231.

and the grantor having sold the estate, and having been denuded by the purchaser, the tenant, when he claimed in right of the wife, after the grantor's death, was opposed by the purchaser, who maintained, that the lease was merely personal, not being clothed with possession, and so could not affect him. This plea was sustained, and the lease found ineffectual against the purchaser. In other two cases the same point was decided.*

These were cases where the tenant was seeking possession, but the same decision would be given even were the tenant in possession, provided the possession did not take place until after the constitution of the purchaser's right; for "a tacksman not having apprehended possession of the lands contained in his tack, before the same was annalized to another party; on a removing, at the instance of the purchaser, the tacksman may not defend himself by this tack and possession, apprehended after the purchaser's infetment."†

In order, therefore, to secure a lease against a purchaser, it must have been followed by possession, prior to the completing of the purchaser's title.‡ But there is a case which has created

* *Hamilton v. Tenants*, 22d November 1632. Mor. 15230; and *Maxwell v. Tenants*, 3d March 1630. Durie. Mer. 15215.

† *Fraser v. Lady Pitaligo*, 22d Jan. 1611, Had.; Diet. vol. ii. p. 430. Mor. 15227.

‡ *Si introitus in indebitum tempus conferatur, veluti, si tempore in assecatione prestituto ad intrandum colonum, dominus jure suo*

some little difficulty, viz. where a tenant is in possession under a lease, and receives a second lease, to commence at the expiration of the current one; but, before possession takes place on the new lease, the granter sells the lands, and is denuded: May the purchaser remove the tenant on the expiration of the first lease? In other words, Is the new lease effectual against the purchaser?

Where the possession on the second lease is made to commence at its date, and where it differs from the former lease, as by a change of the rent, although the former lease may not have been actually renounced, there seems to be no doubt that the new one will be effectual against a purchaser. "One possessing by a tack, getting a new tack for a lesser tack-duty, presently to commence; it was found, that he might ascribe his possession to the new tack, so as to prefer

privatus est, ut in Ecclesiasticis personis, (He wrote before the abolition of Episcopacy) si ante tempus introitus decesserint, tota assedatio dissolvitur: nam id tempus, quo colonus debet in possessionem induci, quam maxime spectatur, si locator eo tempore jus et potestatem introducendi colonum in fundum habeat; quod si non habuerit, tota assedatio cadit: paria enim jura nostri putant, indebite fieri, et in indebitum tempus conferri. The same opinion is repeated § 11. In his assedationibus, spectandum est semper tempus introitus: nam si in eo tempore, in quod introitus assedationis destinatur, assedator sit inhabilis ad assedationem faciendam licet tempore datæ assedationis, i. e. eo tempore quo assedatio facta est, fuerit habilis, i. e. potestatem ex jure habuerit assedationes conficere, assedatio non valebit; nam respectus habetur potius ad tempus introitus quam confectionis: paria enim in jure sunt, indebite tempore fieri, et in indebitum tempus conferri. Craig, § 7.

“ him to a singular successor in the lands.” But where, on the other hand, the new lease is to commence at the expiration of the former, and in the mean while the landlord is divested, it might be expected that, according to principle, the new lease, on which no possession has followed, should invariably yield to the right of the purchaser. It has not, however, been always so held.

Haddington reports a case in which “ A party having gotten a tack of bonds, and a second to commence at the expiry of the first, and a third to begin at the out-running of the second; in a removing, at the instance of the purchaser of the lands, the Lords found, That the tacksmen could not defend himself by the third tack, the second not being outrun at the time of the sale.” But, this is immediately followed in the Dictionary, by a case in which it was: “ Found, that tenants having tacks for terms to run, and other tacks, the entry whereof to be at the ish of the first, may defend themselves thereby, although the seller should sell the lands before the entry of the last tack, which will not thereby be reputed to be conferred, in tempus indebitum.” This judgment is repeated in several other cases.^d A tenant in possession under a lease, received, two

^a Neilson v. Menzies, 21st June 1671. Stair, Dict. vol. ii. p. 494. Mor. 15231. See Gosford's Report.

^b Ld. of Druyn v. Jamieson, 5th January 1602. Dict. vol. ii. p. 493. Mor. 15209.

^c Preston v. the Tenants of Duddington, 7th March 1604. Mor. 15210.

^d Makcarro, 20th July 1622. Durie. Mor. 15213.

years before its expiration, a second lease, to commence at the expiration of the former, and the landlord having sold the lands, and the purchaser being infeft before the end of the first lease, he proceeded, on its expiration, to remove the tenant, who excepted on the second lease; and although the purchaser founded on his heritable title in opposition to this second lease, on which no possession had followed, yet the Court sustained the tacks, "seeing they were lawfully set, *ab initio*, before the pursuer's right." There is still another very strong case, to the same effect. "A proprietor, during the currency of a first tack, having granted a second, to commence at the expiration of the former, did, after the date of the second, but before the expiration of the first, sell the lands; the question occurred, Whether this second tack was good against a singular successor; on the one hand, it was contended, that here was a tack, and here was possession, all that was necessary by the act of parliament, to make tacks good against singular successors. On the other hand, it was contended, That no tack is a real right, or good against singular successors, unless that whereupon possession has actually followed: That the tacksmen has all along been in possession by virtue of the first tack, and that the second tack can, in no view, be considered as any how better than a simple personal obligation upon the proprietor, to grant a new tack to this tacksmen after the expiration of the former, and which cannot be a more effectual obligation to him, than if granted to any

“ third party, who never was in possession ; good, indeed, against the granter, but by no means against singular successors. The Lords sustained the second tack good against the purchaser.”^a

These cases do not seem to support the principle laid down by Craig, That the want of power in the setter, to introduce the tenant into possession at the commencement of the lease, must be fatal to it; but the Court could not mean to fix the principle, that whenever a tenant is in possession, a new lease granted to him, to commence at any distance of time, will be effectual against purchasers; and it is therefore probable, that the decisions referred to, were founded upon the specialties which occurred in the particular cases. This does not distinctly appear from the reports, but it seems likely, since, in a subsequent case, a very different decision was given. In that case, the tenant possessed under a lease, several years of which were yet to run. He was also cautioner for the landlord in a debt which he was forced to pay, and on account of which he received from the landlord a second lease of the same lands for 63 years, to commence some years afterwards, at the expiration of the current lease, with power to retain the grassum in payment of the debt. Before the commencement of the new lease, however, the landlord's estate was sequestrated and a factor appointed; which rais-

^a Richard v. Lindsay, 6th January 1725. Dict. II. p. 421. Mor. 15217.

ed the question, how far the second lease, on which no possession had followed, was to be held effectual against creditors. The tenant founded upon the case of Richards and Lindsay, (*supra.*) But the Court found, "that the tack was not "good against creditors, in respect the tacksman "did not attain the possession of the lands, let by "virtue of the tack quarrelled, prior to the date of "the infestment in favour of the real creditors, or "prior to the adjudications, at the instance of the "personal creditors; and, that the said creditors "themselves did first attain the possession by their "factor."^a

In Lord Cranston's case, the lease set aside was evidently not an ordinary act of administration, but the constitution of a security in favour of the tenant. It seems to be fixed, that where there is a prorogation of a tack given, not in the ordinary course of administration, and upon which no possession has followed, it will not be effectual against a singular successor.^b Whether a renewal of a

^a Lord Cranston's Creditors *v.* Scott, 4th January 1757. Mor. p. 15218. The judgment in Campbell *v.* Siller, 30th Novem. 1785. Mor. p. 15223, appears to be inconsistent with that in Lord Cranston's case, but the Court was much divided in opinion.—Specialties weighed with some of the Judges; and although the lease, in that case, was for the unfavourable period of 99 years, yet the rent was adequate, and there was no preference given to the tenant. *Vide infra.*

^b Creditors of Douglas *v.* Carlyles, 2d July 1757. M. 15219. Scot *v.* Graham, &c. November 30, 1769. M. p. 15220. Creditors of York Building Company *v.* Fordyce, 7th July 1778. M. p. 8380, affirmed in appeal. Same parties *v.* Threepland, same date, reversed on appeal. M. p. 8380.

lease for the benefit of the estate, and without any view to the advantage of the tenant, or of any third party, would, without possession, be sustained against a purchaser, is a point which has not lately been decided. But questions of this nature have occurred with heirs of entail; and the Court seem to have made a distinction. Where the lease has been renewed immediately before the expiration of the former, and in the ordinary course of management, it has been sustained against the succeeding heir, although no possession has taken place: But a lease to commence at a distant period, has not been supported. This distinction is proved by several decisions.

The entail of Blythswood prohibits leases for a longer period than 19 years. In 1750, the heir in possession granted a lease of a certain portion of the lands, which was current till Candlemas 1770. In March 1766, the tenant obtained a second lease for 19 years, to commence with crop 1770; and the granter having died in 1767, when there were three years of the former lease to run, the question occurred with the next heir of entail, Whether the lease, commencing with crop 1770, was binding on him. This question was brought out by a removing, at the instance of the heir of entail, in which the tenant founded on his new lease. The sheriff, before whom the question came, sustained the second lease, as good for 19 years from its date; and the point having been brought before the Court by advocacy, it

was argued for the heir of entail, That the first tack was current for four years, at the time that the second was granted; and the second tack not having been followed by possession in the granter's lifetime, it could not be binding on the pursuer, who, as an heir of entail, was not bound to implement the deeds of a preceding heir. To this it was answered, That, had the lease been so expressed, as to have made its endurance commence from 1766, in place of 1770, it would have afforded no objection to it, that it had been granted before the expiration of the former. The present challenge was, therefore, ungracious, and the more so, that this transaction was a fair one, entered into *bona fide* with the late Blythwood, in the ordinary administration of his affairs, when there was no reason to fear that he would die before the expiration of the lease. That it was incumbent on the heir to point out in what manner the judgment of the sheriff would infringe any one condition of the entail; since it had done no more than support the new lease to the extent of a 19 years' lease from the 1766, a power which, confessedly, the heir in possession was entitled to have exercised. Supposing a lease for 22 years in place of one for 19, to commence at the distance of three years, this certainly would have included an intention of giving a lease for 19; and, as his powers extended to a lease of this period, equity would go no farther than to restrict the lease of 22 years to one of 19.

The same principle, it was argued, regulates the case of legacies, and where a man gives a nuncupative legacy, exceeding the sum allowed by law, it will be ineffectual only as to the excess. It was replied, that there was no similarity between the cases: That had the late Blythswood granted a tack to commence immediately, but for a longer space than the time allowed by the entail, there might have been some analogy between this case and that of a nuncupative legacy, above the value of £100 Scots, though even then it would have been an infringement of the condition of the entail. But the plea of the heir of entail in this case is, that the tack in question cannot be sustained for a day, not on account of the period of its endurance, but from its not having commenced until after the death of the granter. The Court, on this debate, "advocated the cause, "and found, that the defender, in virtue of the "tack, dated the 6th March 1766, has right to "possess the lands libelled for 19 years from the "date of the said tack."^a Another case of the same kind occurred in 1792. The estate of Chatto is held under a condition of not setting leases, for more than 19 years. A lease on this estate was to expire in 1791. In 1788, three years before the expiration of the lease, an agreement was entered into between the tenant and the heir in possession, for a new lease, to endure for 19 years,

^a Campbell v. Love, 14th July 1772. Fac. Coll. Mor. 15519.

at an increased rent, the tenant also waving some privileges of ploughing, which he enjoyed at the close of the former lease. This agreement was put into the hands of the landlord's agent, in order that he might prepare a lease; and the tenant laboured the farm differently from the mode in which, under the old lease, he was entitled to have done; he repaired the houses, and, with a view to his future possession, expended about £100 on the farm. But about six months before the term of entry under the new lease, the granter died. The first question was, Whether there was a written lease. And the memorandum, followed by the change in the tenant's management, and his expenditure on the farm, being held equivalent to a written lease, the question came to be, Whether, on that assumption, the present heir of entail could be bound to give effect to it, as the tenant was not in possession under it, when the granter was denuded.

The argument was nearly the same as in the former case, and that decision was much relied on; the only difference consisted in this, That, on the part of the tenant it was maintained, that he ought to be considered as having possessed under the new lease from the instant of its date, as he had, from that time, completely changed his plan of management; while, on the other hand, it was urged for the heir of entail, that, as in Blythswood's case, the tenant was supposed to have renounced the old lease, and betaken him-

self to the new one, a presumption arose which could have no place in this case, as the tenant possessed under a conveyance to the lease, incomplete in itself, and which would not have entitled him to grant a legal renunciation.

The Court, in this case, as in the former, sustained the new lease for 19 years from the date of the agreement.^a

The distinction which was made in this case, between an act of ordinary administration, such as renewing a lease within a short time of its termination, but in such a manner as not to enlarge the powers of the heirs of entail, and the constitution of a lease at a distant period, is further confirmed by a case, in which the Court had to decide on the effect of a lease for 19 years, to commence at the expiration of a current lease, of the endurance of four 19 years. They had no hesitation in finding, that the future lease could not affect an heir of entail, and it was accordingly reduced.^b

^a *Redhead v. Kerr*, 27th November 1792. Bell's 8vo. Cases, p. 202. In the reasoning on the Bench, the general rule was admitted, that possession is necessary in order to render a lease, granted by an heir of entail, effectual against the succeeding heir; but a distinction was taken between a lease, made to commence at a distant period, and one in the circumstances of the present, where the renewal of the lease was no more than an act of ordinary administration; and it was observed, that it would be attended with good consequences, were a power given to the heir, by the entail, to renew leases a few years before their expiration.

^b *Leslie v. Orme*, 2d March 1779. Fac. Coll. Mor. p. 15530.

In so far, then, as heirs of entail are concerned, it would appear that the renewal of a lease, which can be considered as an act of ordinary administration, will be sustained, (although the grantor may predecease the term of entry,) the period of endurance being computed from the date of the renewal; while a lease, which, from the distance of its commencement, cannot be considered as falling under the ordinary acts of administration, will not be supported. Whether the same principle would be received in questions between a purchaser and the tenant of the seller, relative to ordinary acts of administration, has not been expressly fixed by any late authority; although the cases already referred to,* seem to point out the principle on which such questions would be decided. But these questions are not likely to occur, as a person desirous to sell, will not choose to incur himself with a prorogation of the tenant's right; or, when he does so, will provide for it in the agreement with the purchaser. Distinctions have been attempted to be raised where the new tack, or the prorogation, is written on the back of the old one. It has been argued, that the two agreements are in this manner incorporated and firm, but one agreement in a question with singular successors after their date. It is more correct, however, to consider them as separate. If they are meant to be incorporated, the new leases should be so expressed, and the old one cancelled, or the new lease should be declared to have commenced,

* *Supra*, p. 51.

notwithstanding its date, at the date of the old one. But these are questions which ought to be guarded against by the contracting parties.

SECT. II.

THE EFFECTS OF THE LEASE WHEN PROTECTED BY THE STATUTE.

CONSIDERING the lease as reduced into writing, as containing all the requisites of a written deed, as having a precise yearly rent, a specific period of endurance; and, as being followed by possession, so as to be entitled to the full benefit of the statute, we next inquire,

1. Who, in the sense of the act, are to be considered as purchasers?
2. What is the effect of the lease against the superior of the lands?
3. What is its effect as a security for debt?
4. What conditions will be effectual against a singular successor?

1. **PURCHASERS.** From attending to the mere letter of the act, we should be led to imagine, that its effects were confined solely to the case of a purchaser by a regular sale from the proprietor. The rubric of the statute is thus expressed:—
“The buyer of the landes sould keep the tackes
“set before the buying;” and the act declares,
“that suppose the Lordis sall sell or annalizie that

"land, or landes, the tackers sall remain," &c. But practice has explained this differently, and the act is held to apply to every singular successor, in what manner soever he may have acquired right to the lands: Stair says expressly, that the statute "is extended against all singular successors, whether by sale, exchange, apprising, adjudication, or any other way; as the statute bears, 'that tackers sall remain with their tackes, in whose handes soever the landes come.'"^a

2. SUPERIOR. It might be supposed, that this act was intended to secure the tenant as well against the superior as against purchasers; since the expression is, "into whose hands soever the landes sall come." But Erskine^b holds, that this expression affords no security to the tenant against the superior, when the feu opens to him by non-entry;^c for, it is a principle of the Scottish

^a Stair, B. II. tit. ix. § 2.

^b Ersk. B. II. tit. vi. § 26.

^c Non-entry is one of the casualties attending blench or feuholding. It arises from the heir's neglecting to enter with the superior, and is rendered effectual by a declaratory action before the Court of Session. From the death of the ancestor to the citation in the action, the retour duties are due to the superior; in feuholding, the feu-duty is the retoured duty, and therefore nothing is due, that would not have been due, independently of the non-entry; in blench holding, the retoured duty is the new extent. From the citation to the date of the decree, the full rent is due; and from the date of the decree, the superior is entitled to enter into possession. But, in practice, there is no instance of matters being carried this length; the vassal pays his relief duty, and takes his entry.

feudal law, that when the feu is, by the falling of any feudal casualty, returned to the superior, it is returned disincumbered of the acts and deeds of the vassal. If, then, it should happen that a vassal should continue unentered, and should allow his superior to take a decree of declarator of non-entry against him, the superior would be entitled to take the natural possession of the land, notwithstanding any tack by the vassal, under the burden only of the privilege reserved to the tenant by the act 1491, c. 26. which entitles him to continue his possession until the Whitsunday following such decree. In such a case, the right of the tenant would revive, on the vassal's obtaining an entry from the superior, and the tenant would be entitled to continue in possession for a period equivalent to that portion of his lease which was unexpired at the time of his expulsion. The tenant, of course, would be entitled to recover damages from the landlord, by whose neglect the superior was enabled to exclude him.

3. SECURITY FOR DEBT. It is obvious, that by giving the tenant a right to retain the rent of his farm, in payment of a debt due to him by the landlord, or by making the rent payable to any other creditor of the landlord's, all the purposes of an heritable security would be attained without any entry in the records, indicating the nature or extent of the burden ; and that, to support such a destination of the rent, in opposition to the claims of a singular successor, would be in di-

rect opposition to the act 1449; yet such, at one time, was the opinion of the Court.*

When this question first occurred, the Court were perfectly aware of the effect to be produced by sustaining this new species of security, and of giving it the effect of a wadset, or heritable bond: But they seem to have been led to support the lease, by considering it as effectual against a purchaser under the act, wherever there was a precise period of endurance, and a certain surplus of yearly rent, however small; and, therefore, wherever the ish was certain, and there was a surplus rent after paying the interest of the debt, as the farm might have been effectually set for that surplus rent alone, they seem to have thought the lease valid, although the consequence of that decision was to render the lease a security for debt.^b Nay, the Court have gone the length of sustaining a tack against a purchaser, where the whole rent was allocated for the payment of interest.^c

But, at last, this question received a full and deliberate discussion, when a better opinion prevailed. The landlord had borrowed 4000 merks from the tenant, to whom he, of the same date, gave a lease for five years, at a rent of 200 merks, with so many poultry, &c.; and it was declared in the lease, that although the rent

* See several cases. Dict. vol II. p. 422. Mor. p. 15234, &c.

^b Oliphant v. Currie, 11th December 1677. Stair. Mor. 15245. Ronald v. Strang, 23d January 1625. Durie. Mor. 15236.

^c Seton v. White, 13th November 1679. Fount. Mor. 15173.

was payable to the landlord, yet it was agreed and concerted, that the tenant was yearly to retain the interest of the 4000 merks, it being agreed, that a discharge of the interest of the debt should be received in payment of the rent. The estate was afterwards sequestrated, and the question arose, Whether the tenant, in virtue of this clause, was entitled, in a competition with real creditors, to retain the interest of the 4000 merks out of his rent. The former cases were all enumerated and founded on. It was stated from the Bench, That the distinction was not solid between the cases of a surplus rent and no surplus; for the retainable sum, as well as the surplus, was the rent, and the seller could not enable the tenant to retain from a singular successor any part thereof, more than he could entitle him to retain the whole.^a

This decision shows, that such devices, for giving security to a tenant, can have no effect against an heritable creditor or purchaser; an opinion that has been since called in question, when the same decision was repeated, and a power of retention given to the tenant, in payment of a debt due to him by the landlord, disregarded.^b

^a *M'Tavish v. M'Lauchlane*, 11th February 1748. Mor. p. 15248.

^b *Creditors of Lord Cranston v. Scott*, 4th January 1757. Mor. 15218. In this case, (the particulars of which were formerly mentioned), Scott, the tenant, had been cautioner for Lord Cranston in a debt which he was forced to pay; and, for his relief, Lord Cranston gave him a prorogation of his tack, to commence at the expiration of the former one, with a power to retain the grassum

4. **THE EFFECT OF OTHER CONDITIONS.** In the modern lease, there are many conditions relative to the management of the farm; the repairing and building of houses, or the making of enclosures; and, it may often come to be a question, how far these conditions can affect a singular successor.

1. We have seen that the lease is protected by the statute, and that, of course, the natural possession of the ground may be retained from the singular successor by a tenant, and may be converted to any agricultural purpose which does not absolutely ruin the soil. The singular successor can, therefore, have no title to object to any regulation relative to the plan of management of the farm, since these regulations must consist of restraints on the power of the tenant. Besides, it is necessary, for the security of the tenant, that all regulations connected with the management of the farm should remain in force, into whose hands soever the estate may come. There seems,

and the surplus rent under the old lease, after paying the interest due to certain heritable creditors. Thereafter the landlord's estate was sequestrated; and his creditors, by infestments and adjudications posterior to the date of the prorogation, on the footing that no possession had followed on the prorogation, maintained, that it could not affect them; and they further denied, that he could retain the surplus tack-duties, as the sequestration was preferable to any such assignment of the rents. The Lords found, that the by-gone rents, preceding the sequestration, did not fall under the factory; but that the rents, since the sequestration, did fall under it, and reduced the new tack, in so far as concerned the interest of the creditors, reserving action to the tenant against the landlord.

therefore, to be no doubt, that all the conditions of the lease, relative to the management of the farm, must be equally binding on the singular successor, as on the granter and his heirs.

2. With regard to the repairing or building of houses, matters seem to be in somewhat of a different situation. The landlord is bound to repair the houses; this is a burden on him, the expense of which he ought to bear. But should the tenant undertake these burdens, on condition of his being allowed retention out of his rent, it might be doubted whether a singular successor, who had acquired right to the estate, after the repairs, and before the rent fell due, should be bound to allow deduction for those repairs; since they are a debt of the granter of the lease, and seem to be no more entitled to a preference than any other debt of his. Bankton says expressly, "a clause, allowing the tacksman to retain out of the tack-duty, the expense of repairs on the lands or houses, will not operate against purchasers, who will have right to their full rent from their entry."

This is a question that will not frequently occur; but the expense of building a house, or making inclosures, where it is not to be re-paid until the end of the lease, is one that seems to depend

* Bankton, B. II. tit. ix. § 25. *Rae v. Finlayson*, 5th February 1690. *Stair. Mor. p. 15216 and 10211*. In this case the tenant had undertaken to repair a tenement within burgh, on being allowed to retain the rent for his re-payment. This condition was found to be personal only, against the seller, and not to affect a purchaser.

on the same principle, and which the Court has repeatedly decided.

A lease of certain lands for 26 years, contained a clause, obliging the landlord and his heirs to repay, at the expiration of the tack, the expense of building dykes, which expense, it was stipulated, should not exceed £50. The dykes were built in 1730, and in 1731 the tenant purchased the lands. In 1754, at which time the 26 years from the date of the lease expired, the tenant, now the proprietor, brought his action against the heir of the seller, for the £50. The tenant argued, that he had a right to make this demand, as he had paid a higher price for the lands, on account of the inclosures which had been made, than he would otherwise have paid, and the sum demanded was a personal debt, for which the seller, his heirs, and successors, were liable, and which could not have been demanded from a purchaser, without an express stipulation. To this it was answered, that this claim was payable at the expiration of the lease, because it was then that the landlord was to reap the benefit; and the tenant, being now proprietor, he would enjoy the benefit, and could have no claim against the seller: That had the sale been made to a third party, in place of the tenant, the claim must have been made against the third party, and not against the seller.* On this debate, the Court

* This argument has appeared to many conclusive against the judgment in this case, which has of late been considered as a very doubtful decision.

found the heir of the seller liable in payment of the £50.*

By this decision, then, a sum of money, to be expended by the tenant upon the farm, and stipulated in the lease to be repaid by the landlord at the end of the lease, is held to create a personal obligation on the landlord, and not to constitute a debt against a purchaser; and this seems to be consistent with the principle of the lease, by which there ought to be no debt constituted against the landlord, and rendered real on the farm, so as to affect a singular successor.

But there are two later decisions of an opposite tendency; and it is necessary to inquire, whether they are founded on any principle which can affect the authority of the former decision. 1. A lease for 19 years from 1751, contained a clause, declaring, "That, in case the tenant shall think proper to inclose any of the grounds of the said lands with sufficient country dykes, they shall at their removal, on leaving them sufficient, be paid a comprised price for the same, not exceeding one year's rent." The estate was sold by judicial sale in 1763. In 1765, an action was brought by the tenants against the seller, concluding, that he should pay £24, being one year's rent, which they were entitled to lay out in building dykes in terms of the lease. This action was dismissed, leaving to the tenant to make his claim, at the expiration of the lease, for the value of such dykes as should

* *M'Dowal v. M'Dowal*, 17th December 1760. *Fac. Coll. Mor.* p. 15259.

be built. On the expiration of the lease, a second action was brought by the tenant, for the price of the dykes which had been built, and both the seller and purchaser of the farm were called as defenders.—The Lord Ordinary found “the seller liable in £13 : 12s, as the value of the dykes; and, in respect there is no obligation in the tack to build the dykes, That the obligation to pay a sum, not exceeding £24, depended on an uncertain event, and that there is no mention of assignees, assoilzied the purchaser.” But the Court, on a reclaiming petition, found the purchaser liable in payment.^a

2. A tenant became bound to build a house on the farm, for which he was to be allowed £50 out of the rent.—The landlord sold the farm; and the purchaser's entry was at Martinmas 1783. The house was built between Martinmas 1783 and Whitsunday 1784; and, when the seller came to demand his rent for 1783, the tenant claimed retention of the £50 from that year's rent. The Lord Ordinary here, as in the former case, found, that the obligation on the seller could not affect the purchaser. But this judgment was altered by the Court, and the purchaser found liable for the £50, as the value of the house.^b

^a *Arbuthnot v. Colquhoun*, 5th February 1772. Fac. Coll. M. 10424.

^b *Maxwell Morison v. Pattillo and Laird*, 3d February 1787. Fac. Coll. M. 10425.

On comparing these two decisions with the former, there is one very remarkable point of distinction. In the first case where the seller was found liable, the building had been erected prior to the sale; in the two latter cases, where the claim was sustained against the purchaser, the buildings had been erected posterior to the sale, and after the farm had become the property of the purchaser. Without, therefore, affecting the principle of the former decision, these more recent decisions may be accounted for on another principle; for, either the expense was properly laid upon the person who was proprietor at the time it was incurred, which is consistent with the judgments pronounced in all the cases; or the Court may have thought, that where a building was erected, or an improvement made prior to a sale, the purchaser would take that into consideration, in making his offer; and that the seller, who in this way received the price of the improvement, was the proper debtor in the obligation; whereas, in the case where the improvement was not made until after the purchaser had acquired possession, he alone had the benefit of the improvement, and ought therefore to pay for it.

From these decisions we may therefore conclude, that where a sum is stipulated to be paid by the landlord to the tenant, for any improvement, or operation to be performed, if the improvement has been made, or the operation performed during the landlord's possession, it will constitute a personal debt with which a singular suc-

cessor has no concern. If, on the other hand, the improvement has been made after the singular successor has acquired possession, it will form a debt against him.*

It remains still to be considered, whether it be in the power of the singular successor to prevent the tenant from fulfilling a condition of this kind, which may be expressed in the lease, but which has not been implemented before the singular successor has acquired his right.

This question will probably depend on circumstances; were a person to sell an estate, after having entered into a contract with an architect to build a mansion house on it, there can be no doubt that the contract would remain personal, and could in no shape bind the purchaser; whereas, on the other hand, the building of farm-houses, or the making of inclosures, may have been in the tenant's view in entering into the lease, and are therefore operations, the expense of which would fall upon a singular successor. Perhaps this distinction may be taken,

* In a recent case, a singular successor who had purchased, during the currency of a lease, was found liable in a claim made by the tenant at the end of the lease, for the expense of houses built prior to the sale. The obligation on the landlord, in this case, did not appear even in the lease, the tenant's claim being founded upon an alleged verbal agreement between the seller's predecessors and their tenants, and upon a local practice. The judgment was founded upon the local practice, although there were no means by which the purchaser, who was a stranger, could discover the existence of such a practice. *Bells v. Lamont, &c.* 14th June 1814. *Fac. Coll.* p. 645.

That all acts of ordinary administration, which have been deemed necessary by the landlord and tenant for the time, will be effectual against a singular successor, while, notwithstanding a provision in the lease, he may prohibit, or at least refuse to pay for mere decorations, not essential in the management of the farm.

4. The power of cutting down wood at a certain price, where the wood is not cut in haggis, might very justly be doubted, were it opposed by a singular successor.

To bring the objects of this section into one view, it may be observed,

1. That the statute extends to every singular successor.

2. That the rights of the superior are not affected by the lease.

3. That the lease cannot be used as a security for debt, operating against singular successors in the lands, either by giving to the tenant a right of retention, or by making the rent payable to any particular creditor of the landlord's.

4. That every lawful condition of the lease, connected with the purposes of agriculture, will be effectual against the singular successor.

5. That where a debt is constituted by the lease in favour of the tenant, on condition of his performing certain operations on the farm, if these operations are performed *after* the farm

has passed to a singular successor; the debt will be effectual against the singular successor.

6. That where a lease contains obligations on the tenant to perform certain operations, the expense of which is to be defrayed by the landlord, these obligations, if they relate to agriculture, or the improvement of the farm, will constitute a debt against the singular successor; whereas, if they are merely ornamental, and for the decoration of the place, it would seem to be competent to the singular successor to prevent them from being executed.

7. That conditions relative to the cutting of timber, when it is not cut in yearly hagg, may, in certain circumstances, be subject to the regulation of the singular successor.

SECT. III.

THE EFFECT OF THE LEASE WHEN UNPROTECTED BY THE ACT 1449, IN QUESTIONS WITH THE GRANTER AND HIS HEIRS.

IN the preceding section, we have considered the effect of the lease in questions with purchasers, when under the protection of the statute; and

we have seen, that there must be a certain rent, a precise period of endurance and possession, in order to render the lease effectual against a purchaser; that even when it is so constituted as to be effectual against a purchaser, it can neither be used as a security for debt, to the effect of carrying off the rent from the purchaser; nor can any debt of the landlord's be thrown upon the tenant, so as to entitle him to retain his rent from a purchaser; and that no obligation, unconnected with the improvement and management of the farm, can affect a purchaser.

In questions with the heir of the granter, a different rule prevails; there is no occasion for an act of Parliament to make the deeds of his predecessor, whom he represents, binding upon him. He is bound, by representing his ancestor, to fulfil every condition and every obligation effectual against that ancestor. Even where the lease cannot receive implement against a purchaser, the tenant is entitled to return upon the heir of the granter, and to claim his relief; that is, indemnification for the damage which he may have suffered, from a failure to perform those conditions which the granter undertook, and which have not been found effectual against the purchaser.

Formerly, the peculiar nature of a lease was so strictly regarded, that when it was defective in any of the principal requisites, (as where there was no rent, or no definite ish,) it was not thought to be effectual even in questions with the granter

or his heirs. The strictness of interpretation, however, gradually relaxed; and a lease to endure for ever, or without a tack-duty, came to be sustained against the granter, or those by whom he was represented.

1. In 1615, a tack set *in perpetuum*, was declared to be null in a question with the representatives of the granter:^a But, by more recent decisions, a perpetual lease has been sustained against the granter and his heirs.^b And Mr. Erskine^c says, that there is nothing in such leases, (leases in perpetuity, or with an indefinite ish,) more inconsistent with property, than in those granted for life, or for a term of years exceeding

^a Stewart v. Lord Garlies, 15th July 1615. Mor. p. 15187.

^b Carruthers v. Irvine, 23d January 1717. Mor. 15195. In this case, Carruthers of Holmains, in the year 1680, granted a tack to William Irvine, of the following tenor: "Sets and in rental lets, to the said William, the foresaid five-pound land, as then possessed by him and his tenants, and that perpetually and continually, as long as either grass groweth up, or the water runneth down; and obliges him, and his heirs, &c. to renew the present security and right of the five-pound land, to the said William Irvine, his heirs, and successors, aye, and while they find themselves sufficiently secured in the said lands." In a removing, at the instance of the heir of the granter, it was objected, that this tack, or rental, was null, as wanting an ish. ANSWERED, A tack, or rental, wanting an ish, is indeed not good against singular successors; at the same time, it can hardly be doubted, that a proprietor has it in his power to grant such an obligation to his tenant, as shall be good against himself and his heirs for ever. This is not an unlawful obligation, nor is it reprobated in law. The Court found, "That, by the meaning of parties, the contract was intended to be a perpetual right to the tenant and his successors, and therefore assolvied."

^c Ersk. Inst. B. II. tit. vi. § 30.

the ordinary period of life; and that any proprietor may lawfully bind himself to dispose of his property, or of the use of it, in the way he thinks proper. It may therefore be concluded, that a perpetual lease will now be held effectual against the granter and his heirs.

2. With regard to the rent, it has been decided in several early cases, that where no rent is stipulated, the conveyance of land, in the form of a lease, is ineffectual even against an heir. "A tack set by a husband to his wife for her lifetime, was found null at the instance of his heir, because it contained no tack-duty; nor was it a disposition of a life-rent right, because wanting a precept and sasine."^a But by a latter decision, a lease was sustained against the setter and his heirs, where no rent was payable, future rents having been discharged by the granter.^b

3. Possession, though necessary to render a lease binding on a singular successor, is not necessary to give it effect against an heir. From the instant that the tack (which is a mutual contract) is signed by both parties, it becomes binding; and, of course, gives the tenant action against the landlord and his heirs, for implement of its conditions. When a person, therefore, has granted a lease, or a prorogation of a lease, and the granter disposes of the estate before the tenant

^a Lord Grange Durham v. his Brother's Relict, 7th June 1575. Colvil. Dict. Vol. II. p. 417. Mor. 15165. Laird of Ayton v. Tenants, 7th July 1625. Mor. 15167.

^b Ross v. Blair, 31st January 1627. Durie. Mor. 15167.

has obtained possession, the lease will not affect the purchaser, but it will give the tenant a claim for damages against the granter or his heir.

In the same manner a power of retention of the rent, in payment of a debt due to the tenant, though ineffectual against singular successors, will afford the tenant a claim against the heirs of the granter. In short, every legal obligation, inserted by the granter of a lease, will be binding on him and his heirs, although it may not be of such a nature as to affect a singular successor.

SECT. IV.

OF THE BENEFIT OF A POSSESSORY JUDGMENT.

In concluding this view of the lease, it is proper to state the nature of a possessory judgment. This term is borrowed from the language of the civil law. The principle is the same with that of the interdict *UTI POSSIDETIS*. It entitles a person who has possessed uninterruptedly, for seven years, upon a feudal title or upon a lease, to a judgment continuing that possession, and all the rights which belong to it, until,

in a declaratory action, or in a reduction, the right shall be ascertained.

Lord Stair says, that the possessory judgment
“ ariseth from the feudal customs of this kingdom,
“ where there are many subaltern infeftments of
“ the same heritage, and every party keeps in their
“ own hands their own rights; so that if the pro-
“ prietor were obliged to instruct his progress, by
“ insisting for mails and duties, or by recover-
“ ing the natural possession by removing of ten-
“ ants and possessors, his right would be very
“ lame and ineffectual, if any person should pro-
“ duce a prior right, or the possessors should say,
“ they possess in the right of another who had a
“ prior right. So that the proprietor behoved to
“ found upon all his superior's rights prior to that
“ right whereupon the defence was founded,
“ which are not in his hand; and he had no title
“ to get them into his hand but by an incident
“ diligence, if the proprietor, possessing might
“ be excluded by any right prior to his own in-
“ feftment. For remedy of which inconveniences,
“ our law has wisely introduced this remedy of
“ a possessory judgment, whereby proprietors of
“ lands and other heritages, pursuing for rents or
“ removings, or defending their possessions, need
“ allege and instruct no further than seven years
“ lawful and uninterrupted possession, by virtue
“ of an infeftment, whereby they do not only
“ secure the profits they have made as *bona fide*
“ *possessores*, but may continue to enjoy the

"future profits till they be put in *mala fide*, by "judicial production of a better right, by way of "reduction, declarator, or competition." Lord Stair here speaks of a possessory judgment as founded only on infestment, but the same privilege belongs to a leasehold right. Erskine says, that "a possessory judgment founded on seven "years possession, in consequence either of a "sine or of a lease, has this effect, by the law of "Scotland, that one, though claiming under a "right preferable to that of the possessor, cannot "claim the possession, until, in a formal action of "reduction, he shall get his competitor's title of "possession declared void:"^a and, on the authority of an old decision,^c he states, that the lease, "though it should, from some nullity or default, "be subject to reduction, entitles the tenant to a "possessory judgment, by which he may continue "his possession till his tack be formally set "aside."^d

We perceive, in this privilege, the great distinction which originally existed between the Scottish and English lease. The Scottish lease was, under the possessory judgment, protected from every thing, similar to the English recovery, while the English lease, being exposed to a fictitious recovery, required the aid of statute to render it secure.

^a Stair's Inst. B. IV. tit. xxvi. § 3.

^b Ersk. Inst. B. IV. tit. i. § 50.

^c Hume v. Scott, 1st December 1676. Stair. Mor. p. 10641.

^d Ersk. Inst. B. II. tit. vi. § 29.

HAVING thus considered the written lease, as it affords protection to the tenant in questions with the grantor or his heirs—with the superior—the singular successor—or those claiming on a preferable title—we are prepared to consider more minutely the form of the deed, and to analyse its different clauses.

CHAP. III.

COMMENTARY ON THE TERMS OF THE LEASE.

THE lease is a mutual contract, between the proprietor of the subject to be let, who is termed the landlord, and the person to whom it is to be let, who is termed the tenant. By this contract, the landlord gives the use of the land to the tenant for a time certain, and the tenant becomes bound to pay a fixed yearly rent. Besides these, there are generally other conditions agreed upon by the parties, relating to the reservation of rights by the landlord, to buildings and inclosures on the farm, or to the plan of management to be adopted.

This deed, as we formerly had occasion to observe, was originally in the form of a charter, by

which the landlord gave possession to the tenant for a certain period, and burdened him with the payment of the rent; but the disadvantages of this form of deed, which contained no personal obligation on the tenant that could be the ground of summary diligence, and which even admitted of the tenant's renouncing his possession, made it at last be abandoned for a deed in the form of a mutual contract, by which the landlord and tenant are reciprocally bound to each other; and this form is much more necessary in the modern lease, where so many conditions are required for securing the rights of the parties.

The lease, in its simplest form, consists, in the first place, of that annunciation of the parties, which is common to every contract: Then, on the part of the landlord, there is a clause (which I shall term the dispositive clause), by which he gives out the lands with a clause of warrandice. On the part of the tenant, there is an obligation to pay the rent, and to remove at the expiration of the lease: Lastly, There are clauses which affect both parties, as an obligation on them to perform their respective parts of the premises to each other, under a penalty, a clause of registration, and a testing clause.*

* I give here an example of the lease, in this simple form. Some examples, with variations, will be found in the Appendix.

LEASE.

IT IS CONTRACTED, AGREED, and ENDED, between A., heritable proprietor of the subjects after-mentioned, ON the ONE PART, and

Such is the form of the lease where the conditions, relative to the management of the farm, are

Dispositive clause.	B. ON the OTHER PART, in manner following; THAT IS TO SAY, The said A. has SET, and in consideration of the tack-duty after-mentioned, hereby SETS, and in tack and assedation LETS to the said B., and his heirs, ALL and WHOLE, (<i>here the farm will be described</i>), AND that for the space of 19 years from and after his entry thereto, which is hereby declared to commence at the term of , and from thenceforth to be peaceably possessed by the
Clause of warrandice, Obligation to pay rent.	said B. and his foresaids, during the whole foresaid space: WHICH TACK the said A. BINDS and OBLIGES himself, his heirs and successors, to WARRANT to the said B., and his foresaids, at all hands, and against all deadly, as law will. FOR WHICH CAUSES, and ON the OTHER PART, the said B. binds and obliges himself, his heirs, executors, and successors, whomsoever, to make payment to the said A., and his foresaids, of the sum of £ Sterling, in name of tack-duty, and that at two terms in the year, Whitsunday and Martinmas, by equal portions; beginning the first term's payment at the term of Whitsunday , and the next term's payment at Martinmas thereafter, for the first year's rent, being crop and year and so forth, yearly and termly thereafter during the currency of this lease, with a fifth part more of each term's payment of liquidate penalty in case of failure, and the legal interest of each term's payment, from the time that the same shall fall due, during the not-
Obligation to remove.	payment thereof: AND FURTHER, the said B. binds and obliges him and his foresaids, to REMOVE, with their servants and stocking, from the possession of the subjects hereby let, at the expiration of this lease, and that without any previous warning or process of removing: AND LASTLY, BOTH PARTIES BIND and OBLIGE themselves and their foresaids, to implement their respective parts of the premises to each other, under the penalty of £ Sterling, to be paid by the party failing to the party observing, or willing to observe the same, and that over and above performance: AND they CONSENT to the REGISTRATION hereof in the books of Council and Session, or other Judge's books competent, that letters of horning, on six days charge, and all other execution necessary, may follow on a decree to be interponed hereto in common form; and for that purpose they CONSTITUTE
Mutual obligation to implement the lease.	
Clause of registration.	
Testing clause.	, THEIR PROCURATORS, &c. IN WITNESS WHEREOF, these presents, consisting of this and the preceding pages,

left to the regulation of the common rules of law, and where no extraneous condition is inserted. But when we consider the different interests of landlord and tenant, and how essential it is to prevent either party from injuring the other, we shall not wonder that the provisions and conditions of this deed have multiplied as in practice we find them to have done. In place, therefore, of offering a commentary on the simple form of the lease, it may answer the purpose better, and convey a clearer notion of this deed, to consider the different conditions of a lease, in the order in which they usually occur.

With this view, I shall bring my observations on the form of the lease, under the following heads:

- I. By whom a lease may be granted.
- II. The dispositive clause of the lease, containing
 1. The consideration.
 2. The destination.
 3. The description of the subjects.
 4. The endurance of the lease.
- III. The clause of warrandice.
- IV. The obligation on the tenant to pay the rent.
- V. The obligation to keep the houses in repair.
- VI. Obligations relative to the management of the farm.

written on stamped paper by _____, are (with a duplicate hereof) SUBSCRIBED by both parties. At _____, the tenth day of August, one thousand eight hundred and one years, in presence of these witnesses, _____ and _____.

I. WHERE THE GRANTER IS NOT INFEST.

1. *Where the granter is not infest at the time of making the lease, but afterwards completes his title by infestment.*

There can be no doubt that a posterior infestment in favour of the lessor will accrue to the tenant, and validate his right, in the same way that a person uninfest, granting an heritable security, validates that security by afterwards completing his own infestment. But the tenant runs a risk in the intermediate period, particularly if the lessor be an heir unentered; for, should a creditor of the heir adjudge the personal right to the lands, and complete his title by infestment, that creditor would carry off the estate unaffected by the lease, and the tenant would have no other relief than a claim against the lessor, under the clause of warrandice.

2. *Where the lessor is uninfest, and dies uninfest.*

Where the lessor is not only uninfest at the date of the lease, but dies uninfest, his power to grant a valid lease may be questioned, either by his heirs or by his creditors. 1. The question with the heir will depend on the state of the titles to the lands; for, where the lessor has pur-

chased the lands let, although he may not have completed his title, his heir can acquire the estate only through him, and consequently must represent him, and fulfil his deeds. But should the lessor have been an apparent heir, whose title was at no time completed, the question will be regulated by the act 1695, c. 24.* This statute gives a right of action for enforcing the deeds of an apparent heir, who has been three years in possession; and, therefore, where the apparent heir has not been three years in possession, those in his right cannot claim the benefit of the act. But even where the heir has been three years in possession, it has been doubted, whether the lease be a deed which was in the view of the Legislature in that enactment: and, accordingly, Lord Kilkerran says, "It was even thought, that a tack, set by an apparent heir, would not be good against a subsequent heir passing by, as that heir is only made liable to the extent of the value of the subject; which shows, that it concerned only *debita*, or

* The Clause of the act 1695, c. 24, relative to the deeds of heirs three years in possession.

"STATUTES AND ORDAINS, that if any man, since the first January 1661, have served, or shall hereafter serve himself heir, or, by adjudication on his own bond, hath, since the time foresaid, succeeded, or shall hereafter succeed, not to his immediate predecessor, but to one remoter, as passing by his father to his goodsire, or the like: Then, and in that case, he shall be held liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in the possession of the lands and estate to which he is served for the space of three years; and that, in so far as may extend to the value of the said lands and estate, and no further, deducing the debts already paid.

“ deeds that were resolvable into *debita*, and, “ therefore, there was no argument from the case, “ *e. g.* of an heritable bond to a tack.”^a But this case did not admit of a decision on that point ; and, in a later case, a lease, by an apparent heir three years in possession, was sustained against an heir passing by, although its endurance was for 1260 years ;^b and certainly, in all events, there arises a claim of debt on the clause of war-randice, which will be effectual against the heir passing by.

2. But after the death of the lessor, the question may arise either with his creditors, or with the creditors of the heir to whom the succession has opened. In the former case, the right of the lessor's creditors to attach the estate, will depend on the lessor having been three years in possession, and on the present heir's having entered ; since, without the concurrence of these circumstances, the creditors of the lessor cannot attach the estate. But where they can attach the estate, the feudal right vested in them will entitle them to exclude the tenant. In the latter case, where the question is with the creditors of the present heir, those creditors, whenever they shall have completed a feudal title to the estate, will be entitled to reduce the lease : For, since the Legislature has rendered the heir liable for the acts of his predecessor, only in the case where that heir has en-

^a Kilk. voce HEIR APPARENT, No. II. Mor. p. 5270.

^b Irvine, &c. v. Knox, 27th June 1760. Mor. p. 5276.

tered, the sanction of the act is not to be extended to other cases; to the case, for example, where the title has been made up, not by the heir, but by the diligence of his creditors. In the case which establishes this doctrine, the Court reduced a lease, granted by an apparent heir three years in possession, at the instance of an adjudging creditor of the heir's, on the ground, that although the act had given relief in the case of an heir passing by, it had given no relief where the competition was not with the heir, but with the adjudging creditor of that heir.*

3. *Where the lessor is infest, but his right is afterwards reduced.*

The case where the lessor's title has been reduced remains to be considered: And here, as the title, even of a purchaser standing on his disposition and sasine, would be set aside by the reduction of his author's right, there can be no doubt, that the lessor's title being reduced, the right of the tenant, derived from him, must also fall.

II. WHERE THE LESSOR IS INFEST AT THE TIME OF GRANTING THE LEASE.

The lessor ought regularly to be infest in the subject over which the lease is granted; but, sup-

* Louden v. Murray, 13th June 1752. Kilk. voce HEIR AP-
PARENT, No. 2. MOR. p. 5210.

posing this to be the case, there are besides some peculiarities to be observed in the form of the deed, from the manner of expressing the interests of the parties, as well as certain disqualifications which it may be proper to have in view.

1. *By Husband and Wife.*

The question, whether the husband and wife should concur in granting the lease, may arise either where the estate is the property of the husband, and the wife has a provision secured over it; or where the estate is the property of the wife.—In the former case, where the provision to the wife is an annuity in case of her surviving her husband, there is nothing in such a provision which can deprive the husband of his right of administration, or render it at all necessary for the wife to be a party to the lease. Even where the widow is provided in a locality, or eventual liferent, the consent of the wife is not required.*

* The Countess Dowager of Moray *v.* Stewart, 23d July 1772. Affirmed in the House of Lords, 24th March 1773. Mor. p. 4392. The Countess, in case of her surviving the Earl, was provided in certain lands, by way of locality. This provision was made in the marriage-contract, on which sasine followed in 1741. In 1765, the Earl granted leases to Stewart and others, for 19 years, and died in 1767, at which time, the right of liferent in the Countess commenced. She immediately raised an action of removing against the tenants; and the question at issue between the parties was, Whether the fiar of an estate, over which an eventual liferent extends, has a power of granting a lease which shall remain effectual against the liferenter.

Where, on the other hand, the estate belongs to the wife, the husband has a right of administration of the rents of the estate during the marriage, which approaches almost to a right of property; and where this right is excluded by provision, still the husband is curator to his wife, so that no act of hers can be effectual without his consent. On this account, where the estate is the property of the wife, the consent of the husband is required to enable her to grant leases.^a In one case, the Court seem to have been of opinion, that a wife, possessed of a separate estate, may, by herself, perform the necessary acts of administration.^b But this decision appears to

In the debate on this question, it was asserted to be contrary to practice for men of business ever to demand the concurrence of a wife, who has an infestment in her husband's estate, or to require her to join in the lease. The power of the husband, it was said, was sufficient, and it is highly for the interest of the widow that the estate should be under his management. Besides, when a husband infests a wife in a locality, he creates an eventual burden only, he is not divested; and the granting of a lease is an act not of alienation, but of common administration, which every proprietor must have in his power.

The Court found, that the Earl of Moray, notwithstanding the prior liferent, by way of locality, granted to the Countess, and her infestment thereon, had a right to grant tacks of the lands contained in the said locality, effectual against the Countess; and this judgment was affirmed on appeal.

^a It is CONTRACTED, AGREED, and ENDED, betwixt B, heritable proprietor of the lands and others after specified, and A, her husband, for his interest, and as taken burden on him for his said spouse, and they both, with mutual advice and consent ON the ONE PART, and C, tenant in _____, ON the OTHER PART, in manner after written: THAT IS TO SAY, &c.

^b Cockburn v. Burn, 21st February 1629. Dict. Vol. I. p. 401. Mor. p. 3998.

“*accipientis* ; and, if a lease, granted by a tutor or curator, be so conceived as to last longer than his office, the minor, after the tutory or curatory is at an end, may recover the natural possession of his lands.”^a If this rule be confined to leases granted by a tutor, it may be agreeable to the maxim : but it does not appear to apply to the case of a lease granted by a minor with consent of his curator ; since, if a minor may validly sell, he may certainly let his lands for the ordinary period of 19 years. This seems, indeed, to be necessary for the interest of the minor, as well as of the public ; and the decision to which Mr. Erskine refers, in support of his opinion, is confined solely to the case of a tutor.^b

These observations apply to the case of those who are infeft in the lands over which they grant a lease : we have next to inquire into the circumstances which may disqualify a person, standing publicly infeft, from granting leases.

^a Ersk. Inst. B. I. tit. vii. § 16.

^b Harcarse, Supplement, No. 16. Mor. p. 16285. This case is stated in these words, “ A tenant of the Marquis of Huntly’s being pursued to remove by him and his curators ; excepted, on a tack set by Lord Middleton, as tutor to the Marquis. Replied, A tack set by a tutor, could endure no longer than the tutory ; which reply, the Lords sustained, though the advocate, and others, thought it hard.”

3. *Where the power of a person infest is circumscribed.*

1. *By Securities for Debt.*

The modern heritable securities are all granted *in security* of the debt; even the disposition granted by the debtor to his creditor is a disposition in security, and not an absolute right of property; now, a right of property, and a right in security, are not destructive of each other. A, who has a right of property, may, without affecting, or, in the smallest degree, diminishing that right, give a right in security to B. Thus, a proprietor having feued out his estate, gave an heritable bond to a creditor over that estate, excepting from the security the feu-right; that is, he gave an heritable bond over the feu-duties. This was opposed by the vassals, who contended, that the creditor was interposed between them and the superior, and that this was an illegal act. But the Court found, that a right in security might exist without diminishing the right of property in the superior;* and, as the heritable security thus leaves the right of property, and the consequent power of administration entire, it follows, that the modern he-

* Home v. Smith, &c. 22d January 1794. Fac. Coll. Mor. p. 15077.

ritable security cannot affect the proprietor's power of granting a lease.

2. *By Legal Diligence.*

1. *Adjudication and Inhibition.*

It is the duty of a debtor to distribute his estate, heritable and moveable, amongst his creditors; and where this is not done voluntarily, it may be accomplished by means of legal diligence. The poinding, and the arrestment and forthcoming, attach the moveables; and the adjudication and inhibition prevent new securities from being given over the heritage, to the prejudice of the adjudgers and inhibitors. It is the diligence affecting heritage which we are at present to consider; and here it is evident, that as the inhibition and adjudication cannot, with justice to the debtor, be completed by one single act, so, on the other hand, the interest of the creditor requires that debtors should not be allowed to take advantage of the first steps of these diligences, to divest themselves of their property. It is with this view that litigiousity has been introduced into the law of Scotland, by which, from the date of the execution and publication of the inhibition, and from the date of the citation given on the summons of adjudication, the debtor is barred from defeating the diligence, by disposing of his heritage. Mr. Erskine says, with regard to the ap-

prising, "That it has stronger or weaker effects, according to the different lengths to which it has been brought; as soon as lands to be appraised were denounced, they became litigious, so that no voluntary deed, granted afterwards by the debtor, though previously to the decree of appraising, could hurt the begun diligence. This doctrine is received by all our writers, and supported by an uniform tract of decisions; in the case, not only of deeds granted for the security of creditors, but in leases, dispositions, or other voluntary rights, granted to strangers for a price presently paid, or other valuable consideration." And he afterwards states, that the same effect is now produced by a citation on a summons of adjudication, which was formerly produced by the denunciation in the appraising; and further, that the same litigiosity arises from the execution and publication of an inhibition.*

Thus it appears, that litigiosity, founded on the execution and publication of an inhibition, or on the citation on a summons of adjudication, disqualifies the debtor for granting a lease.

* Ersk. Inst. B. II. tit. xii. § 16.

• Ibid. § 41.

• Ibid. tit. xi. § 7.

2. Ranking and Sale, and Sequestration.

1. The process of ranking and sale has not the effect of divesting the debtor of his right in the estate, until the sale has actually taken place, and the decree of sale has been pronounced; even then, in order to divest the debtor completely, the feudal right of the purchaser must be complete. The sequestration seems in no shape to divest the debtor, though it may deprive him of the power of management; as, by the sequestration, the rents and management are taken into the hands of the Court, and administered, by a judicial factor. Hence it follows, that the dependence of an action of ranking and sale should not deprive the proprietor of the power of performing ordinary acts of administration, though it should put an end to extraordinary acts of administration; while the sequestration of an heritable estate should deprive the proprietor of the power of administration, and yet not prevent a tenant from completing his lease by obtaining possession.

1. With regard to the process of ranking and sale, the several decisions prove, that though it does not prevent the proprietor from performing ordinary acts of administration, it will prevent him from performing extraordinary acts of administration. The first case affords an example of an act of extraordinary administration, which was not supported, though it was admitted, that an act

of ordinary administration would have been effectual. Certain lands were let on a 15 years' lease, during the currency of which an action of ranking and sale was raised against the landlord. While the action was in dependence, and before the old lease had expired, the landlord granted a new lease of the same lands, at a small advance of rent, to commence several years afterwards, on the expiration of the old lease.

The estate was afterwards sequestrated, and on the expiration of the first lease, an action of removing was brought by the judicial factor. The tack was reduced, on the ground of its having been granted during the dependence of the ranking and sale. The reporter observes, "That a ranking and sale, without sequestration, bars not ordinary acts of administration, but ought to bar extraordinary acts, such as a new lease during the currency of a former."^a

The two subsequent judgments illustrate the distinction in a very satisfactory manner. The only difference between the two cases was, that, in one of them, the lease, which was for the period of 99 years, had been granted at the expiration of a former one, and so far was to be held as an ordinary act of administration, the endurance of it never coming into question;^b while, in the other case, there was a new lease for

^a Carlyle v. Lowther, 27th February 1766. Sel. Dec. No. 242. Mor. p. 8380.

^b Creditors of York Building Company v. Fordyce, 7th July 1778. Fac. Coll. Mor. 8380. Affirmed on appeal.

37 years, to commence at the distance of five years, the term of expiration of the lease then current, which rendered it an act of extraordinary administration.^a

The Court of Session reduced both leases, making no distinction between the case of an ordinary and extraordinary act of administration. But the two cases having been appealed, the House of Lords recognised the distinction; affirming the decision, which reduced the lease, where it was clearly an act of extraordinary administration, but reversing the decision in the other case, where the lease was an act of ordinary administration.^b

^a Creditors of York Building Company v. Threipland, 7th July 1778. Mor. p. 8983. Reversed on appeal.

^b The following were the circumstances under which those leases were granted: The annuitants on the estates of the York Building Company raised an action of ranking and sale, in 1735; and, in 1744, the Duke of Norfolk applied for a sequestration of the estates of the Company, and represented to the Court, that the Company were letting leases of their lands at an under value. On a report, the Court, in June 1745, sequestrated the estates of the Company, and prohibited them from setting tacks without the authority of the Court. During the interval between presenting the petition of sequestration and the judgment of the Court, the leases in question were granted, so that they were exposed only to the objection founded on the ranking and sale.

In 1776, the greater part of the annuities having been extinguished, an act of parliament was obtained by the postponed creditors, for a total sale of the estates, and they were afterwards sequestrated, and a factor appointed. The factor brought a reduction of the two leases to Fordyce and to Threipland; the latter of which had now endured for 20, the former for 15 years.

The plea maintained by the Creditors of the Company was, That the Company had no power to grant the lease in question, because they were insolvent, and the annuitants drew the rents: that the lands had been adjudged, and a process of sale, and a pe-

The dependence of a process of ranking and sale, therefore, is no bar to ordinary acts of administration, such as renewing a lease, on the expiration of a former one. But it will form an effectual bar to the prorogation of a lease during the currency of a former. In the same manner, a lease of long endurance, or for a grassum, will be objectionable, because it is a kind of alienation, and not an act of ordinary administration.* Indeed, it must be obvious, that no person of ordinary prudence will accept of even the renewal of a lease, under such circumstances.

2. Sequestration, as it confers the management on a judicial factor, though it does not completely divest the debtor of his right of property, seems to put an end to his right of management; and, in arguing these cases, it was universally admitted, that a sequestration had that effect.

Still the question remains, whether the proprietor be so far divested of his property, that a tenant, holding a lease granted while the proprietor is in the full exercise of his powers, may not in-

tion to sequester, in dependence; and that, in these circumstances, the unlimited administration no longer remained with the Company. It was answered, That the Company remained in the administration of their estates at the date of the lease: that they had not been deprived of it by any thing that had then taken place; and that, until they were actually removed by the judgment of the Court, third parties, who saw them in possession, must be safe in transacting with the Company.

* *Earl of Wemyss v. Murray and Others*, 17th Nov. 1815. Fac. Coll.

sist for possession, during the subsistence of the sequestration, but before the granter has been feudally divested of the property, and so complete his lease, and render it effectual against the creditors or future purchasers.

This question occurred in Lord Cranston's case. Lord Cranston had granted a prorogation of a tack for three periods of twenty-one years. This prorogation was given in the 1750, to commence in 1755. In 1754, the estate was sequestered; and the creditors contended, that, although their infestment and adjudications were posterior in date to the prorogation of the lease, yet, as no possession had followed on that prorogation, it had not become real before the sequestration, and was therefore ineffectual against them. It was answered, That Lord Cranston, at the time of granting the prorogation, being in full possession of his estate, the rent was not thereby diminished; and that this act of administration could not be rendered ineffectual by the posterior sequestration. " The Court found, that the tack was
" not good against creditors, in respect the tacks-
" man did not attain the possession of the lands set,
" by virtue of the tack quarrelled, prior to the dates
" of the infestments in favour of the real creditor,
" or prior to the adjudications obtained at the in-
" stance of the personal creditor; and that the
" said creditors themselves did first attain the pos-
" session by their factor, after a judicial sequestra-
" tion of the estate, and therefore sustained the

“ reasons of reduction, in so far as concerned the
 “ interests of the creditors.” *

The doctrine of this interlocutor may certainly be doubted. The tenant was in possession at the time when the prorogation commenced; and although there were infestments in favour of heritable creditors, and adjudications led, as well as a sequestration of the estate awarded, yet Lord Cranston remained undivested; and, admitting that he was in such circumstances, deprived of the power of management, it does not follow that a tenant, with a lease granted while the landlord possessed full powers, may not acquire possession, and consequently be entitled to compete with the creditors; who, on the other hand, were equally at liberty to have divested Lord Cranston, by obtaining sasine on a decree of adjudication.



A subsequent case serves to confirm these doubts. A lease was granted at a high rent for 99 years, to commence in 1780. In 1778, the lessor's creditors brought a sale of his estate, and a sequestration was awarded. The tenant was admitted to possession by the judicial factor, who continued for several years to receive the rents. At last, a reduction of the lease was brought by the purchaser of the estate, who pleaded, that the lessor had been divested of the administration of his estate before the term of the

* Lord Cranston's Creditors v. Scott, 4th January 1757. Fac. Coll. Mor. p. 15218. See also Creditors of Douglas v. Carlyles, 2d July 1757. Fac. Coll. Mor. p. 15219.

tenant's entry; and that in such a case, a tack, not followed by possession, is ineffectual either against the creditors, or the purchaser as coming in their place; and that although the factor had ceded possession to the tenant, yet as he had no power to grant such a lease, neither had he power to give it effect. It was answered, that the real securities of creditors are not incompatible with the right of property in their debtor; and that at the tenant's entry, the lessor, notwithstanding all the proceedings, was alone invested with the property of the estate, so that the case differed from that of a singular successor infest: that at the date of the lease the lessor lay under no restraint; and that, so as long as he continued undivested of this property, the lessee had power to compel implement of the obligation over that property; and that, therefore, the factor did that voluntarily, which the Court would have ordered him to do. Lord Braxfield, who was Lord Ordinary in the case, repelled the reasons of reduction, and sustained the lease; and, although the Court pronounced a different judgment when the case was first brought before them, they came in the end to agree with the judgment pronounced by the Lord Ordinary; the prevailing opinion being, that the lessor was as truly proprietor after, as before the sequestration.*

On this second point, then, it seems to be the law, that the sequestration deprives the debtor of the power of management, so that even the renewal

* Campbell v. Siller, 30th November 1785. Fac. Coll. Mor. p. 15223.

of a lease, or any ordinary act of administration, will be struck at by the sequestration; whereas, the debtor not being feudally divested, a person holding a lease, granted while the debtor possesses the power of administration, will be at liberty to complete his lease, and so acquire a preference, by obtaining possession of the farm before the creditors have completed their rights.

3. *By the Law of Deathbed.*

The law, which has so carefully guarded the interests of creditors, has not overlooked the interests of heirs. The law of deathbed protects them against leases, as well as against more permanent alienations. But it protects them without burdening the proprietor with unnecessary restrictions; and those leases, which may properly be termed ordinary acts of administration, are not objectionable under this law, while a lease of extraordinary endurance, or for a grassum, or granted under suspicious circumstances, will fall under it.

A tack was reduced at the instance of a nephew against his uncle, on the head of deathbed, the uncle having received from the common ancestor, within a few days of his death, a lease of part of his estate, the endurance of which lease was for 38 years.* A lease granted on deathbed for three 19 years, was set aside at the instance of

* *Bogle v. Bogle*, 19th June 1759. Fac. Coll. Mor. p. 3235.

the heir.^a But although a lease of this description be reducible by the heir, it is not in itself null, and an act of homologation by the heir will render it effectual.^b

4. *By an Entail.*

Entails are intended to preserve estates in the family of the entailer; and it seems to be essential, with a view to this object, that the mansion-house, and seat of the family, shall not be in the hands of a tenant. An heir of entail, therefore, though he may set the mansion-house during his lifetime, is prohibited, by the nature of his title, from depriving the next heir of the power of residing there. "Sir John had given to Lord Cathcart a tack of the mansion-house, gardens, and pleasure grounds round the house; OBJECTED, by the pursuer, these could not be set, to preclude the heir of entail from the possession of his family seat. The Lords sustained the reasons of reduction."^c The same decision was pronounced in a subsequent case;^d and the act 10 Geo. III. provides, as an exception to the power thereby given, of granting leases of entailed estates, that no lease be granted of the manor

^a *Christieson v. Kerr*, 20th December 1735. Mor. p. 3226.

^b *Fordyce v. Fordyce*, 14th December 1743. Kilk. voce Homologation, No. I. Mor. p. 5700.

^c *Lord Cathcart v. Stewart-Nicholson Shaw*, 31st January 1755. Fac. Coll. Mor. p. 15399.

^d *Lesly v. Orme*, 2d March 1779. Fac. Coll. Mor. p. 15530.

place, with the offices, gardens, and adjacent inclosures, which have been usually in the natural possession of the proprietor.^a

But, in the administration of entailed lands, there is not necessarily any restriction, in regard to the power of granting leases, provided they be completed by possession, during the incumbency of the granter. The entail carries a right of property to the disponent, and heirs in succession; and their power of administration can only be restricted by the express terms of the deed. In a case where there was no express prohibition of long leases in the entail, a lease for four 19 years was sustained.^b

A lease, then, where there is no restriction in the entail, may be granted for a long period of endurance; but, to render such a lease effectual, the tenant must be in possession, during the continuance of the right of the heir of entail, by whom it was granted. This point also was fixed by the decision, in the case of *Lesly v. Orme*, to which reference has been repeatedly made; for, in that case, a second lease was given for 19 years, to commence at the expiration of the lease, for four 19 years; and, this second lease not having been followed by possession during the lifetime of the granter, was declared null. The

^a Act, 10th Geo. III. c. 51. § 3.

^b *Lesly v. Orme*, 2d March 1779. Fac. Coll. Mor. p. 15530.
Affirmed on Appeal, 25th Feb. 1780.

same decision has been since repeated, and also affirmed on appeal.^a

Where there is no restriction on the power of granting leases, it may be questioned, whether the heir of entail in possession has a power of granting leases, at a diminished rent. If this be allowable, the entail may be defeated, as it will be impossible to distinguish (where any diminution is allowed) between a lease, where there is a small, and a lease, where there is a great diminution; while, on the other hand, it may be said, that entails are entitled to no favour, and no restriction is to be laid on the heir, which the granter has not imposed on him.^b

Where the entail contains no restriction with regard to the power of granting leases, it seems necessary only, that the lease which is granted be rendered complete, during the existence of the lessor's right; and that it do not include (except for the granter's life) the mansion-house, offices, gardens, and grounds, usually possessed by the proprietor; and it may be proper not to let the lands below the former rent, unless by public roup.

Where the entail prohibits leases, the prohibitory clauses ought to be plain and perspicuous, and they should be guarded by the irritant and resolute clauses of the entail, in order to render

^a Redhead v. Kerr, 27th Nov. 1792. Bell's 8vo. Cases, p. 202.

^b See Elliot v. Curries, 16th January 1798. Fac. Coll. Mor. p. 18430. See also a great deal of argument as to what is to be considered a diminution of the Rental. Earl of Wemyss v. Murray, &c. 17th Nov. 1815. Fac. Coll.

them effectual.* It will be further observed, that, although an heir of entail be prohibited from

* The Queensberry leases have given rise to a very full discussion of the powers of heirs of entail, in regard to granting leases. In the Court of Session, it has been found that an heir of entail who is prohibited by the entail from letting leases for a longer period than 19 years, or with a diminution of the rental, and from taking "grassums for any tack or rental to be set by them," (the heirs of entail,) "but to set the lands and estate at such reasonable rents as can be got therefor, so that the succeeding heirs may not be hurt nor prejudged by the heir in possession, setting the lands at an undervalue, or taking, by way of grassum, what falls annually to be paid out of the produce of the lands;" may take renunciations of leases, and let the same lands again at the same, or an increased rent. *Marquis of Queensberry v. the Executors of the Duke of Queensberry*, 15th Nov. 1815. *Fac. Coll.*

It has also been found, that an heir possessing under an entail, prohibiting alienation, and permitting leases, if set without evident diminution of the rental, cannot let leases upon grassums. In these cases, it was held that a lease for 97 years was equivalent to an alienation, and therefore *ultra vires* of the heir of entail in possession; and, as in one of the leases for that period, no shorter definite period of endurance was specified, the lease was entirely reduced. In general, the Court seems to have regarded all these leases as granted not in a "fair husband-like administration of the estate," but for the purpose of forestalling the rents and profits thereof, "which would have otherwise belonged to succeeding heirs of entail,"—and thereby enriching the heir in possession, at the expense of his successors, by enabling him to enjoy more than his own life interest in the estate; and on that general ground their decision proceeded. *Earl of Wemyss v. Murray and Others*, 17th Nov. 1815.

These cases have been recently reconsidered by the Court, and are not yet finally disposed of by the House of Lords. The arguments of the parties will be found abridged in the Faculty Collection. And the opinions of the Judges are printed and bound up with the *Fac. Coll.* of Session Papers. See *Dow's Reports*, Vol. V. p. 297, for the opinion of the Lord Chancellor.

granting leases of the lands, he will not be prevented from granting leases of the rents of these lands.*

Should the conditions of the entail be too rigidly expressed, in regard to the power of granting leases, the act 10 Geo. III. c. 51, permits an heir of entail to grant leases for any number of years, not exceeding 31, or for 14 years and one existing life; or for two existing lives, provided, that in leases for two lives, the tenant shall be taken bound to enclose one third of the lands, in 10 years, two thirds in 20 years, and the whole in 30 years; and, in leases for any term of years, exceeding 19, to enclose one third of the land before the expiration of one third of the time; two thirds of the land before the expiration of two thirds; and the whole before the expiration of the time of such lease; no enclosure to comprehend more than 40 acres, (unless the land be unsuitable for culture by the plough,) and the fences to be kept, and left in good repair, by the tenant.

These observations exhaust the cases of limitations and disqualifications, affecting the right of a lessor, whose title is apparently complete; and the next division comprehends the powers possessed by those holding a temporary right only.

* Lord Cathcart *v.* Stewart Nicolson, 31st January 1755. Mor. p. 15399.

III. WHEN THE RIGHT OF THE GRANTER IS OF A TEMPORARY NATURE ONLY.

1. *As that of a Liferenter.*

The right of liferent may be either actual or contingent. 1. Where there is an actual right of liferent, it is obvious that, in order to enable him to grant a lease for years, the liferenter must have the concurrence of the fiar; and then the two, for their respective rights of fee and liferent, may give a lease for a term of years: Without the concurrence of the fiar, the right of the liferenter entitles him to grant a lease to endure for his own lifetime only, unless it should happen that a power is given to the liferenter, by the deed constituting the liferent, to set leases for years, which, if it were properly guarded, would be a very expedient regulation. 2. The contingent right of liferent is best explained by the case of a widow possessed of a locality, and there we have seen, that her right may be circumscribed by the exercise of the fiar's power previous to the opening of the liferent.*

* The general rule of law being that a liferenter enjoys his right *salva rei substantia*, it may be proper to remark here, that he cannot grant leases of the coal, freestone, limestone, or other minerals in the liferented lands. See Stair's Inst. B. III. tit. iii. § 74. Ersk. Inst. B. II. tit. ix. § 57. See also the opinions of the Judges in *Waddell v. Waddell*, 21st January 1812. Fac. Coll.; a case which illustrates both the rule and the exception.

2. *Of a Tenant.*

The tenant, though his right be of a temporary nature, has, in certain cases, a power of sub-setting, as it is called ; but, this is a power which will be more regularly considered in treating of the *destination* of the lease, and the powers of the tenant.

IV. WHERE THE GRANTER ACTS BY DELEGATED POWERS.

1. *As a Tutor.*

THE office of tutory is intended to supply the want of capacity in the pupil, and to enable the tutor to administer the affairs, during his pupilarity. It would have been natural to expect, in such a situation, that the tutor might have performed every act of ordinary administration, and that, of course, he might have granted a lease of ordinary endurance : but the law has viewed a lease granted by a tutor, as an act of the tutors, and has applied to it the rule of law, *resoluto jure dantis, resolvitur jus accipientis* : so much so, that a tutor, having neglected to take up an inventory of the pupil's estate, was removed from the office, and a lease which he had granted reduced, on the ground that the granter's power was

at an end.^a Leases, therefore, granted by tutors, can endure no longer than while they hold the office.

Cases may, however, occur, where it is necessary for the interest of the pupil, that a lease should be set for a longer period than the endurance of the tutory; and where this is the case, the Court of Session, upon an action being brought, to which all having interest are made parties, will authorise the lease, if the necessity of the case be apparent. But a summary application to this effect will not be received.^b

2. *As a Factor or Commissioner.*

A proprietor may, no doubt, confer a power on a factor or commissioner to grant leases, and where that is done, the terms of the commission will be the measure of the power. It is usual to give a power to a factor, of outputting and inputting tenants: but this does not seem to be a sufficient authority for enabling the factor to grant leases for years. Where a power of this kind is given, the duration and nature of the lease should be expressed.

A judicial factor has a power of setting the lands for one year only; but he should do so by

^a Lothian v. Somerville, 25th January 1794. Edg. Coll. Mor. p. 16337.

^b Hallows, petitioner, 1st March 1794. Fac. Coll. Mor. p. 14981.

public roup, and not below the former rent: Where the former rent cannot be got, he ought to apply to the Court for a warrant, to let the lands at a lower rent.* These warrants given by the Court, never extend beyond the year, unless where the case is attended with very uncommon circumstances.

In one case, an application was made to the Court, for the renewal of a lease for 30 years, on condition of the tenant's proceeding with a certain plan of improvement. To this application, the apparent heir, as well as several of the creditors consented, and none of them opposed it. The Court so far approved of the application, as to remit the petition to the Ordinary, to inquire into the facts set forth, which was in some degree a decision on the relevancy.^b But now, that a judicial sale may take place before the Ranking, there can be much less reason for such an application, and, in all probability, it would be rejected.

The duty of the Court is to preserve the estate to the creditors, and to have it sold to the best advantage; and this is more likely to be done, by letting it from year to year, and leaving the whole open to the operations of the purchaser. If any case can justify the interference

* Shaw, petitioner, 19th June 1750, *Kilk. voce Factor*, No. 9. *Mor.* p. 4070.

^b Cawfield, petitioner, 19th December 1758. *Mor.* p. 14846.

of the Court, the following seems such a one: A proprietor of mines surrendered his estate to his creditors; it was sequestrated, and a factor appointed. But it was found, that the mines could not properly be wrought under the direction of factor, and they were deserted. An offer was then made by an English Company, for a lease of 30 years. None of the creditors opposed this measure, but the Court refused their authority, on the ground of their want of power.* It is stated, that, on the general point, the Court thought they had no power to authorise the granting of leases for a longer period than would be sufficient to bring the estate to sale; and, in regard to mines, they had still greater doubts of their power, as a lease of mines had the effect of exhausting the property; so that what was in form only a lease, might, in effect, be a sale: And the application being renewed, it was again rejected, though with regret.

THESE observations include most of the cases respecting the power of the granter of a lease, and it remains only to bring the whole into one view.

1. Where a proprietor is uninfest, the tenant is exposed to the claims of those who may appear with a preferable feudal title to the lands, and who, in virtue of such title, may reduce the tack.

* Earl of Galloway and Others, petitioners, 18th June 1747. *Kilk. voce* Jurisdiction of the Lords of Session, No. 7. *Mor. p.* 7438.

2. Where the proprietor is infest, the tack will be granted by the person vested in the lands; where the right is in heirs-portioners, by the whole; when in a wife, by her, with consent of her husband; when the proprietor is a minor, by him, with consent of his curators.

3. Securities for debt do not create any disability to grant leases.

4. Disabilities are created, 1. By the litigiousity of adjudication and inhibition. 2. By the sequestration of the estate in a process of Ranking and Sale. 3. By the ranking and sale itself, in regard to extraordinary acts of administration. 4. By the law of death-bed, in regard to extraordinary acts of administration. 5. By an entail, in so far as regards the mansion-house, for any period exceeding the life of the granter; and the rest of the estate, according to the conditions of the deed, when guarded by irritant and resolute clauses.

5. When the granter is a liferenter only, his lease can endure no longer than his own life.

6. When the granter acts by delegated powers, he must, in the common case, be regulated by the terms of his commission; and the lease granted by a tutor, will endure no longer than the office of tutory.

SECT. II.

THE DISPOSITIVE CLAUSE OF THE LEASE.

That part of the lease which I have denominated the dispositive clause, expresses the nature and extent of the right given by the landlord to the tenant.* It is here that any reservation in favour of the landlord is inserted; that the tenant's successors in the lease are fixed; and restraints imposed on his power of subsetting and assigning. In this respect, the English lease differs considerably from the Scottish one; for, in the former, instead of expressing the nature of the tenant's right, by letting the lands to him, and to his heirs, excluding or admitting assignees and subtenants, there is first, what is termed the demise, by which, in all cases, the same form of words is used; and the lease bears, that the landlord hath demised, granted, and to feu-farm let, and set

* It is CONTRACTED, AGREED, and ENDED, between A, heritable proprietor of the subjects after-mentioned, ON THE ONE PART, and B ON THE OTHER PART, in manner after-written, THAT IS TO SAY, the said A has LET, and, in consideration of the tack-duty after-mentioned, hereby SETS, and in tack and assedation, LETS to the said B, and his heirs, ALL and WHOLE; (*here the subject is described*) and that for the space of NINETEEN YEARS, from and after his entry thereto, which is hereby declared to commence at the terms, (*here the term of entry will be expressed*), and, from thenceforward, to be peaceably possessed by the said B, and his forebears, during the whole foresaid space.

unto A. B. all, &c.: Then, after the description of the farm, or the PARCELS, as it is termed, comes the HABENDUM, in which is expressed the nature of the tenant's right: "To HAVE, and to HOLD, (says the English lease,) "the said messuage or tenement, &c. &c.; unto "the said A. B. his executors, administrators, and assigns, from the 25th day of March, "now next ensuing, for, and during the full "time and term of 14 years then next ensuing." This is followed by the Reddendum; and then, in an after part of the lease, the condition is inserted, by which the tenant becomes bound to pay the rent, &c. specified in the Reddendum. There appears here the union of the charter and contract; and, although the Scottish lease, as well as the English one, was anciently in the form of a charter, by which the granter expressed the nature of the tenant's right, and the rents which were to be paid by him, yet the change seems to be more complete in the Scottish lease, which now partakes less of the charter.

The dispositive clause, in the Scottish lease, is a conveyance by the proprietor of the land, while the obligation by the tenant to pay the rent, is contained in that part of the lease, where the obligations on the tenant are expressed; and this arrangement is both more simple and more consistent with the nature of the modern lease.

This clause contains, 1. The consideration, or the inductive clause of the lease; 2. The destination of the lease; 3. The description of the sub-

jects; and 4. The endurance of the lease.—
These shall be considered in their order.

1. *The Consideration.*

The consideration, or the inductive clause of the lease, is, in general, the rent payable by the tenant; in which case, it is very slightly mentioned, as appears from the example of the dispositive clause on the note. But it is more carefully expressed where there is a grassum.*

Where the grassum is to be paid at a future term, the prestation on the tenant's part will be made to contain a bond or obligation for the payment; and, in this part of the lease that obligation will be referred to.^b

The examples in the notes express the ordinary

* "The said A, IN CONSIDERATION of the rent, and other prestations, for which the said B hereby becomes bound; AND, in CONSIDERATION of a GRASSUM of £ Sterling, instantly paid to the said A, of which he hereby acknowledges the receipt, and discharges the said B and his heirs and successors, has LET."

^b "THAT IS TO SAY, the said A has SET, and, for payment of the grassum, and of the yearly tack duties underwritten, LETS to the said B." The obligation on the tenant, in this case, will be thus expressed: "FOR WHICH CAUSES, and, on the OTHER PART, the said B BINDS and OBLIGES himself, his heirs, executors, and successors, NOT ONLY to CONTENT and PAY to the said A, his heirs and assignees, THE SUM of £ STERLING of GRASSUM, or entry money, and that, between and the day of next, with a fifth part more of penalty, in case of failure, and the interest of the said grassum thereafter, during the not payment thereof; BUT ALSO, to content and pay to the said A and his forebears," &c. then the rent is expressed in common form

inductive clause. But the lease may require a narrative, explaining the powers of the grantor, and the reasons for entering into the transaction. It is in this part of the lease that such a narrative is introduced, immediately after the words "THAT IS TO SAY," the said parties CONSIDERING, &c. The narrative should contain such parts only of the deeds referred to as are necessary for explaining the nature of the transaction, with a short and distinct account of the reasons for executing the deed.

2. *Destination of the Lease.*

THIS clause necessarily involves the question, To whom may a lease be granted? at the same time, we shall consider the terms used in this part of the lease—the tenant's right to name an heir—and his power of disposal of the lease.

1. *To whom may a lease be granted.*—The general rule is, that a lease may be granted to any one who is legally capable of adhibiting consent, or of entering into a contract. In regard to a minor *pubes*, a distinction may, perhaps, be made. When the minor has curators, the lease will not be effectual, if entered into against their will, or even without their concurrence.*

* Seton against the Laird of Caskieben, 21st March 1622. Mor. p. 8939. In this case it was found, "That a tack, accepted by a minor, without consent of his curators, was as null, as if he had alienated without the consent of his curators."

But where a minor has no curators, it would appear, that he may legally enter into a lease.—Our law permits a minor to engage in business, and to undertake those obligations which are connected with his employment; and there does not appear to be any good reason for excepting from this rule the business of a farmer. At the same time; this is a question deserving of some consideration on the part of the landlord; and where a cautioner is to be interposed in such a case, it will be best done by his assuming the character of trustee for the tenant during his minority, and until he shall have ratified the agreement.

It is proper to mention here an objection, which would now be disregarded, founded on the act 1702, c. 6,* which prohibits a butcher from taking in lease, or otherwise, above an acre

* *Act discharging Butchers to be graziers.*

Our Sovereign Lady, with advice, &c. prohibit and discharge all butchers and fleshers, to take, brook, or possess, either by themselves, or any others, for their use and behoof, directly or indirectly, any parks, inclosures, or any other lands whatsoever, less or more, exceeding one acre, under the penalty of £100 Scots, for each term they contraveen: and also, to forfeit the whole nolt and sheep that shall be found in the said parks, inclosures, and grazings, belonging to them; the one half thereof to be employed for her Majesty's use; and the other half to the informer: and further, does hereby declare the contraveener to lose his freedom as a burgess, in all the burghs of this kingdom: and likewise declares all tacks already made, or to be made, with any butcher or flesher, or for their behoof, anent the set or farm of all parks, inclosures, and other lands whatsoever, exceeding an acre, to any butcher or flesher, (unless the same be tilled and sown with corns yearly) to terminate, and be void and null, after the term of Whitsunday next to come.

for the purpose of grazing cattle. This act was probably meant to prevent monopolies. But, there is little evidence of its having been attended to in the decisions of the Court; and, in the practice of the country, it has been long disregarded.

In the only decision, so far as I have been able to observe, in which this act was founded upon, the question arose from a butcher's possessing, under a wadset, land for the purpose of grazing. But the Court held, "That the act of parliament, discharging butchers to be graziers, concerned only tacksmen graziers;" and, therefore, refused to sustain action against the butcher."

2. *The terms of this part of the lease.*—Under this head, the different situations of the tenant, to whom a lease may be granted, shall be considered.

1. *Where the lease is granted to a single tenant.*—A lease may be granted to a person without any mention of heirs; and the effect which has been given to such a lease has varied considerably. Anciently, it received a very strict interpretation; and, in a country, torn by intestine broils and family feuds, a deed which was capable of admitting an enemy amongst the landlord's friends and followers, required to be so interpreted. Hence, of old, when a lease did not mention heirs, they were excluded.^b

^a Andrew and Donald Mailice v. Ogilvie, 3d February 1708. Forbes. Mor. 2019.

^b Little v. the Laird of Linton, 23d June 1579. Colvil. Mor. p. 10319.

The contract of lease is now, however, interpreted by the same rules which are applicable to other contracts—a right which is to endure for a certain number of years, necessarily on the death of the first holder, descends to his heirs, until the stipulated period be completed. Even, in the lease of a salt-pan, for 15 years, the Court altered the judgment of an inferior court, finding, that the heir (there being no mention of heirs in the lease) must remove before the expiration of the 15 years.^a The rule has therefore been now long settled, that a lease, for a term of years, without any mention of heirs, on the death of the tenant, descends to his heir.

2. When the lease is granted to joint tenants.—

In judging of the rights of a joint tenant, the same rules which apply to a conjunct right to a land estate will not be followed. Where a lease is given to B and C, and to their heirs, each has an equal interest in the lease; and, on the death of one, his interest will not accrue to the survivor, but will descend to his own heirs. In a lease of this kind, the rent is payable by the tenants, jointly and severally, unless it be otherwise expressed in the lease.^b

The Laird of Drum v. Niven, 11th November 1609. Had-dington. Mor. p. 10320.

^a Thomson v. Watson, 28th November 1750. Kilk. voce Tack. No. 10. Mor. p. 10337.

^b Brown v. Paterson, 18th February 1704. Fount. Vol. II. p. 224. Mor. p. 14629. In this case, the landlord pursued the heir of one of two tenants, who had possessed, on tacit relocation, for the whole

A tack given to two persons and the longest liver and their heirs divides equally between them, during their joint lives, and accrues solely to the survivor.* The right constituted by a lease of this kind seems to differ from that which would be vested in two feuars, whose rights are constituted by the same form of expression; and during the lives of the joint tenants, there will be a species of liferent right only, enjoyed by them; so that, were one of them to assign or dispose of his share of the lease, and should he happen to predecease the other, the right of the assignee would terminate with the life of the cedent, and the lease would belong solely to the survivor; whereas, under a *feu to two persons, and the longest liver and their heirs*, any one of them would have a

rent. The heir argued, that, by the original clause, they were jointly bound, yet, by the relocation, and by a separate possession of one half of the farm, the heir ought to be liable in no more than one half of the rent, corresponding to the part of the farm which he possessed. The Lords thought, that, in equity, the heir was free; but, seeing that the tack was set to them both, *pro indiviso*, without distinguishing their shares of the possession, the obligation was indivisible, and continued, during the years of their possession, *per tacitam relocationem*.

* Lidderdale, 22d June 1627. Mor. p. 4247. A tack being set of the lands, &c. to the pursuer's father, and to the pursuer himself, and longest liver of them two, and their heirs; the Lords found, that the father and son were conjunct and equally tacksmen; and that the benefit of the lands therein contained should divide equally between them, so long as they were both alive; and after the death of any of them, the whole right thereof pertained to the survivor, being set to the father and son, and to the longest liver of them two, and their heirs.

power of selling or burdening his half of the feu, during his life; his share will even be liable for his debts, after his death. This difference between the two rights seems to arise from the nature of the rights, conveyed by a lease, and by a feu-charter.*

With regard to joint leases, it may be observed, that, although one of two joint tenants, and the landlord, may have signed the lease, it is in the power of the parties to resile, unless the other te-

* Lord Boyd v. the King's Advocate, 22d Nov. 1749. Rem. Dec. Mor. p. 4205. In this case, the distinction above-mentioned is well illustrated. The York Buildings Company granted a lease in 1743, of the estate of Linlithgow, for two 19 years, "To William Earl of Kilmarnock, his wife, and the survivor of them, and the heirs, executors, and administrators of the survivor." The Earl suffered death for his accession to the rebellion in 1745; and was survived by the Countess, and by a son of the marriage. The crown, on the ground that the Earl had forfeited the lease by his rebellion, entered a claim to it, and appearance was made for Lord Boyd, the son; who contended, that the Countess, by surviving the Earl, was alone entitled to the tack. The crown maintained, that, by the above destination, the Earl was fiar, and the Countess only a liferenter in case of her survivance: that it was attachable by his creditors, and therefore forfeited by his attainder. The Court found, that the right to the lease was in the Countess. It is stated, in the report of this case, that Lord Elchies was of opinion, that the maxim, that a fee could not be *in pendente*, was inapplicable to this case, in respect that a lease, though made real by statute, against singular successors, is but a personal contract, conveying no property to the lessee, but only a right of possessing for a rent certain; and that, for this reason, there is nothing in law to bar a tack to be granted to two conjunctly, neither of whom has the power of disposal, without the consent of the other. He further observed, that this was a different case from a bond, where one must have a power of taking payment, because the debtor must always have a power to pay.

nant shall also become bound: But where the landlord and one of the tenants, not only sign the lease, but where the tenant enters into possession, that tenant will be bound to perform all that by the lease is incumbent on both tenants. This, however, will be afterwards more fully considered.

3. Where the lease is granted to a Company.—

A lease may be granted to a Company; but as entering into a lease is not an ordinary act of administration, the deed ought not to be signed by the Company firm, but by the individual partners: In a lease to a Company, the effect of the dissolution of the Company upon the lease ought to be kept in view; and to prevent any question as to the endurance, it ought to be expressed whether the lease is, in that event, to terminate; or whether the surviving partners are to have a power of assigning for the remaining period, otherwise the bankruptcy of the Company may put an end to the lease.*

* *Campbell v. the Calder Iron Company*, 11th December 1805. Not reported, but noted in Bell's Commentaries, Vol. I. p. 32. (3d edit.) The lease of an iron mine was granted to "David Muschet of the Calder Iron Company, for himself and partners, excluding assignees, legal or voluntary, and all subtenants, except with the proprietors' consent." The Calder Iron Company failed; and on their works being purchased by a new Company, Muschet became bound to supply them with iron ore from the veins contained in the lease. In an action at the landlord's instance, for having it found that the lease had been forfeited, the Court held the lease to be at an end, by the bankruptcy of the Company; and, in consequence of the necessity of their assigning to another, in order to take benefit under it, which the lease prohibits. This, it was held, would have been the case in an agricultural farm, much more, therefore, in this instance. Lord Meadowbank had difficulty,

4. *Where the lease is entailed.*—A lease may not appear to be the proper subject of an entail; yet there is a case, in which the Court seemed to be rather of a different opinion. An entail of certain leases had been made; and the Court found, that the heir had a right to be served heir of entail, so as to prove his title to them. It was observed by the Court, “ That leases, though “ none of the objects of the act 1685, may yet be “ settled by entail; of which, however, few instances have occurred.”*

3. *The tenant's power to name an heir.*—This is a question of considerable importance to the tenant; for, where a lease is given to him and to his heirs, and, at the same time, contains an exclusion of assignees and subtenants, the tenant, if under this form of destination he has no power of naming an heir, may find himself very unpleasantly situated. The heir-at-law may have no inclination to follow his father's profession.—Or another member of the family may be much better qualified for conducting farming operations.—Or the succession may open to heirs portioners. There are, in short, many considerations which may render it very much the interest of all parties, that the tenant should enjoy some latitude in the choice of his successor in the lease.

from the circumstance that the landlord might have held Muschet bound to the end of the lease; and it is not easy to find one bound and another free. But specialties rendered it unnecessary to decide this point.

* Earl of Dalhousie v. Lieut. Maul, 1st March 1782. Fac. Coll. Mor. p. 10963.

On the other hand, in judging of the tenant's interest in a lease, though the same considerations which formerly existed with regard to the *delectus personæ*, on the part of the landlord, do not exist, they, no doubt, have given a bias to the opinions on this point; and there are still many circumstances which may induce the landlord to prefer one tenant to another. One person may possess skill, or capital, sufficient to make it a desirable object for the landlord to retain him as his tenant, while another may be of so quarrelsome a disposition as to render it equally an object with the landlord to exclude him; accordingly, the express terms of the lease are held to be the conditions of the tenant's possession; and possession to any greater extent, or in any other shape, has not been permitted. This construction is founded in the nature of the contract of lease.

In a case where a tenant was prohibited from assigning or sub-setting, it was found, that he could not, in the form of an assignation, appoint a person to succeed to him.*

* Lord Minto v. Deuchar, 20th November 1798. Mor. p. 15295. In this case, the lease had been granted "To the tenant and his heirs, including assignees and sub-tenants, voluntary or legal." The tenant conveyed the tack to his son James in liferent, and after his death to George Deuchar, his son-in-law. The tenant died, and was succeeded by his son James, the liferenter by destination. James also died during the currency of the lease, leaving an infant daughter, Mary: and a question arose between the son-in-law, Deuchar, under the conveyance, and Mary, the heir-at-law of the original tenant, regarding the right to the lease. The Court found that the lease belonged to the heir-at-law.

This question has since been very fully discussed. A lease was granted to the tenant "and his heirs, secluding assignees and sub-tenants, without the landlord's consent."—The endurance of the lease was for 38 years, and for the lifetime of the tenant who should then be in possession. The lessee disinherited his eldest son, and nominated his second son to succeed him as "*heir*" in the lease, and the second son, accordingly, on his father's death, entered into possession. The lessor's successor continued for some years to receive rent from the second son; but this, it appeared, was before he had an opportunity of examining the leases of his tenantry; and, on discovering how the fact stood, he raised an action of removing against the second son. After a great deal of argument upon the import of the term "*heirs*," and after much difference of opinion, the Court removed the second son. On an appeal, the House of Lords remitted the case to the Court of Ses-

In pronouncing this judgment, the majority of the judges seemed to be influenced by the necessary exclusion of any person claiming under a conveyance from the tenant, seeing such conveyance was prohibited: and although this was in effect to deprive the tenant of the power of defeating the right of the heir-at-law, and to expose him to all the absurd consequences which must follow from such a rule, yet the decision was pronounced with all these consequences fully in view, they having been very strongly brought under the consideration of the Court by some of the Judges. In the subsequent case of *Cunningham and Grieve*, the Judges in the minority (including Lord President Campbell and Lord Meadowbank) expressed great disapprobation of the judgment in Lord Minto's case.

sion for farther consideration, when the Court adhered to their former judgment.*

* *Cunninghame v. Grieve*, 8th March 1803. *Fac. Coll. Mor.* p. 15298. And *Fac. Coll. Vol. XI. Appen.* p. 7. *Mor. Appen. voce Tack.* No. ix. p. 17.

I shall give the circumstances of this case more precisely, with some account of the opinions delivered in this Court, and from notes subjoined to the printed papers in a later case, what is stated to have been said by the Lord Chancellor.

Lieutenant-Colonel Francis Cunningham of Dunduff, and his Commissioners, *v.* William Grieve, second son of the deceased William Grieve, tenant of the lands of Barlaugh and others.

By a lease, dated January 18, 1759, James Whiteford, the proprietor of the estate of Dunduff, let the lands of Barlaugh "to William Grieve and his heirs, secluding assignees and sub-tenants, without the heritor's consent, and that for the whole time and space of 38 years, and the liferent of the said William Grieve, if then alive, or of the heir or heirs of the said William Grieve, who shall at the end of the said 38 years have succeeded to, and shall then be in the possession of the said lands, and that from and after the entry thereto, which is hereby declared to be and begin at the term of Whitsunday next to come, according to the Old Style, being the 26th May next."

The specific endurance of the lease expired at Whitsunday 1797, and Wm. Grieve, the tenant, having died in the beginning of 1796, was succeeded by his second son William Grieve, in virtue of a deed executed by William Grieve the father, in Sept. 1790; this deed, on a narrative, that his eldest son Adam was ignorant of farming, and that William his second son had been bred up to the business, and had been useful to him; therefore, he "nominated and appointed the said William Grieve, his son, to be his heir, entitled to succeed him in the tack of Barlaugh, and to enjoy all the privileges arising therefrom after his decease, as his heir, and in like manner as his heir-at-law would have been entitled to—And I dispoise said tacks to my son William accordingly, hereby secluding my said son Adam, and the heirs of his body, from any succession to me in heritage, of whatever description, providing always that my said son William, by his acceptation hereof, shall be bound, and is hereby taken bound, to implement, pay, or perform such burdens, obli-

In the interval, between the decision in Cunningham's case in the Court of Session, and the or-

"obligations or prestations, as it shall be found I have already laid, or may hereafter lay on him by a separate deed or deeds, at any time in my life, and even on death-bed."—William the son continued as tenant to pay the rent and receive discharges, from the period of his father's death, to Martinmas 1798. But in March 1799, an action of removing was instituted against him. The landlord alleged, that this action was not raised sooner, because his question with Sir John Whiteford prevented him from completing his titles, or from knowing the state of his tenants, and the situation in which they stood; that when he came to know the terms of the lease, a communing took place between him and the tenant for a new lease; and that communing not having had a favourable issue, the action of removing was brought, and in this manner the plea of homologation was answered; and the question turned simply on [this, whether in a lease so expressed, it was in the power of the tenant to assign or convey a right that should deprive his heirs at law of that title which it was the object of the lease to bestow. The landlord maintained, not only that the tenant had no such power, and, therefore, that the second son had no title to the farm; but further, that even the heir at law had now no title, for his title being made to depend upon his being in the natural possession of the farm at the expiration of 38 years, and he never having possessed, that the farm reverted to the landlord.

Lord Armadale, Ordinary, decerned in the action of removing, and this judgment was adhered to by the Court. It was (May 18, 1802,) a second time brought under review, when opinions were delivered to the following effect:—

On the one hand, it was said, that, in deciding this question, it is not so properly the flexibility of the term heir, as the comprehensive nature of that term, by which the question is affected. We derive the term from the law of Rome, by which an heir was a person named by the proprietor. In adopting the terms, we have introduced the principles also of the Roman law: Thus a fee to heirs may be given to strangers, and they will be held to be heirs by destination. The term heir, therefore, means heirs by nomination, as well as heirs at law. In the case of a lease given to a tenant and his heirs, it is given to the tenant's heir in heritage; nor does the term heir add to the right; it would be the same whether the lease

der of the House of Lords, another case occurred, in which it was attempted to raise a distinction in

were given to the tenant simply, or to the tenant and his heirs; and in either case, it would go to the tenant's heir in heritage. Now, there are two descriptions of heirs, heirs at law, and heirs by nomination; and it is the heir by nomination that stands in the first place, and is highest in the consideration of the law. A lease, therefore, to a tenant and his heirs, must go to the person whom the tenant shall name to succeed him as his heir in that lease, whether he be a younger in place of an elder son, one daughter in place of all the daughters equally, or a stranger in place of the heir at law. The lease is an heritable right, and the succession to it cannot be limited, without terms meant to create a limitation in the succession. But it has been said, that taking the subsequent clause into consideration, by which assignees are excluded, an heir cannot be called to defeat the interest of the heir at law; because he must enter by an assignation, since our law has given no means of naming an heir, who shall, as such, possess the privilege of succession, competent to an heir at law: this, however, is to make mere forms overturn what is established on the rules of substantial justice. Suppose the question to have arisen on a feu-right, with a clause of pre-emption, and that the vassal executes a settlement, calling in a stranger, that would not be an infringement of the clause of pre-emption, and the feu might dispoise to his heir. We use the same form of words in selling an estate, as in settling it on an heir; but there is an obvious difference between the two. In a settlement, the granter says, "I give, grant, and dispoise to myself, perhaps, in the first place, whom failing, to my son; whom failing, to a stranger;"—but that does not make a sale. Or, to take an illustration from the Roman law; would the nomination of an heir be held to be a sale, because, by the forms of that law, a fictitious sale was gone through in constituting the title of the heir? A Judge must discriminate between the nature of the rights that come before him; and distinguish those which actually constitute a sale, from these by which the right of succession is carried forward. For instance, a deed of succession contains no warrandice, and it bears a power of revocation, though it contains, at the same time, the dispositive words of the disposition of sale, "I GIVE, GRANT, and DISPOSE;" the one is given for a price, the other for love and favour—the one may be considered as a sale, the other cannot. In the one deed, the receiver must represent the granter, either universally, or *in valorem*,

favour of the person named by the tenant, on the ground that the word *executors* was used in the des-

according to circumstances ; whereas the receiver of the other right is under no such obligation ; but it is needless to go through all the distinctions. The Judge must consider the deeds that come before him, according to their real and substantial meaning, and not according to the mere words of form.

In another view, it may be asked, whether it be the effect of this destination to put an end to the power of making a settlement of a lease ? And here it is not quite easy to lay aside the feeling, that this is a power most proper to be reposed in the tenant ; but the argument on the other side does not go the length of denying all such power ; it admits its existence, but it places it in the landlord. This argument must be erroneous ; no such power is given to the landlord, nor can be supported by the Court. But it has been said, if the power of naming an heir be given to the tenant, he may easily evade the exclusion of assignees, and he will pretend to settle the right on an heir, while he is in fact conveying his lease to a stranger ; he may make a *post obit* sale. But it would be easy to distinguish between a sale, and a gratuitous conveyance ; and were such a case to occur, the Court would not hesitate to refuse effect to the conveyance. Of this there was an instance in the case of Lord Gallaway, where, under the form of a factory by the tenant, a right was given to strangers ; which the Court would not authorise. The general rule therefore certainly is, that a tenant, with such a right, cannot sell or convey his interest to a stranger for value, and the exception from this general rule is in favour of the gratuitous conveyance to an heir ; but to say that the tenant is not entitled to settle the succession to his lease, because, under that cover, he may sell, is to reverse the matter ; to turn the exception into the general rule, and to make the general rule the exception.

On the other hand, it was observed, that the point at issue involves the question, whether the tenant may adopt a second son in preference to an elder son, or a third in preference to a second ; or where there are no sons, whether one cousin may be substituted for another ; or in place of them, even a stranger introduced ; and where a stranger is thus introduced, whether another stranger may not also be named ; so that, ultimately, the heirs of provision not only of the original tenant, but of a stranger are introduced ; and

tion. The lease, as in Grieve's case, was for 38 years, and the lifetime of the lessee, if he should

in this way every person whom the tenant in possession chooses to adopt is admitted. This is a consequence which flows unavoidably from defeating the interest of the heir at law; and though it may appear immaterial, whether a second or a third son be called, yet, by going this length, you must go farther, and admit every one.

The lease is a mutual contract, and in the interpretation of its clauses, we do not inquire whether it was a stipulation originating with the one party or the other—as little can we resort to the law of Rome for a rule of interpretation. The peculiarities of the Roman laws of succession are unknown in our law; and in all heritable subjects, we have an order and rule of succession, of which no part is derived from the Roman law.

The first thing to be observed is, that wherever a property is vested in a person, it is immaterial whether heirs be expressed, as they necessarily succeed in that property to which the person receiving the right had an absolute title. But the case is very different in mutual contracts regarding heritable property, where there are mutual interests in the parties, and, of course, a complete exclusion of all other heirs than what are expressed: thus, take the case, that two people, possessed of an estate, were to settle it on the heirs of C, it would not after that be in their power to deprive the heirs of C of the right—In the same way, in the case of a lease, the landlord lets to A and to his heirs; this means the heir at law, and can mean none else. The landlord has the right to the land, and he can be excluded from possession only by the terms of the lease, and by that heir alone to whom the right is given. There is farther a *delectus personæ* on the part of the landlord, which entitles him to object to any other tenant than what the lease calls in; and, therefore, in a mutual contract of lease, where both parties have joined in giving the lease to the heir of the tenant, it is thereby given to the heir at law, and vests a right in him, of which he cannot be deprived.

This reasoning applies to the common case, where a lease is given to heirs, much more to the case where there is an exclusion of assignees; and it does not appear that when they are excluded, it is possible, in fair construction, to admit of younger sons in preference to the elder, or of cousins; were such a construction admitted there would be no limitation to the admission of strangers.

be in life at the expiration of that period, or if previously dead, for the lifetime of his nearest heir "or executor" then in possession of the farm, and

Had it been regular by our forms to nominate an heir, who might, under that nomination, have taken up the right; or could the tenant have excluded his eldest son from his succession, by which means the next heir would have come in, there might have been greater doubt. But these are not the regular methods of calling in an heir; and wherever the heir at law is passed by, there must be a conveyance to the person meant to be preferred; and that conveyance is struck at by the exclusive clause in the lease.

This is the substantial ground on which this matter ought to be decided, and on which, in fact, it has been decided. There are cases stated, where it would be of advantage that one heir should be preferred to another, and such a power may be very expedient; but it must be the subject of stipulation, for without an express allowance, such a power must be held to be irregular.

Such was the general scope of the argument in the Court of Session. It was farther urged, in support of the tenant's power, that a decision unfavourable for him would introduce a strange inconsistency; for instance, a proprietor obtains a lease of his teinds to himself and his heirs, with an intention of making the right to the teinds descend to the same series of heirs to whom he gives the lands; accordingly, he executes a settlement of his lands, calling in a stranger, to whom he conveys also his right of teinds; can it be possible, that this conveyance shall effectually convey the estate, but have no effect over the teinds, because the proprietor, holding the lease to himself and his heirs, they must go to his heir at law, and to none else? yet, absurd as this may seem, it is the direct result of the argument in favour of the landlord.

On this debate, the Court of Session decided in favour of the landlord; and the question being carried to the House of Peers by appeal, the Lord Chancellor is said to have delivered the following opinion:—

"The question is, where a lease was granted to a man and his heirs, including assignees and subtenants, whether it was competent for the tenant to constitute his heir, or if the heir must not be in strict sense his heir of line? If the heir of line is the only heir, the appellant in this case cannot hold the lease.

"This is a case of very great importance to the landlords and tenantry of Scotland; and it is for their mutual interest in regu-

it bore the same exclusions. The tenant having died during the currency of the lease, his son and

“ lating all future questions of the same kind, that there should be
“ an authoritative judgment on this point.

“ In Lord Minto's case, decided in 1798, the term heirs was
“ found to mean heirs of line; and although the appellant has
“ attempted to distinguish that case from the present, yet I can
“ perceive no solid grounds of distinction between that case, as it
“ is reported, and the present one. There may, however, have
“ been a difference between that lease and the present one, of
“ which I am not aware, as it is only very shortly stated in the re-
“ port. But supposing that Lord Minto's case should be held as
“ having decided the general principle, that ‘ heirs’ means heirs of
“ line only, it is said that previous to that decision there was no
“ idea that a man, having a lease conceived in these terms, could
“ not nominate his heir. And, if that be true, there must have
“ been a number of similar leases then existing, and still subsist-
“ ing, upon the parties in which that decision must therefore have
“ been a surprise.

“ From 1798 to the present case, it does not appear that Minto's
“ case has ever been followed as a precedent in the Court of Ses-
“ sion, although it may have been followed in practice; and this is
“ an important consideration, if that decision was a surprise upon
“ the parties to leases. But it was justly observed, that Minto's
“ case cannot bind this House; neither can it be held as binding
“ the Court of Session.

“ From the pleadings in the Court below, which are very ably
“ drawn on both sides, it appears that the consideration of this case
“ was limited to the clause which lets the farm to William Grieve
“ and his heirs, &c. and that which describes the commencement
“ and endurance of the tenant's interest, and that no attention was
“ paid to the other parts of the tack. It is proper, however, that
“ the whole of the tack should be considered.

“ It has been said, on the part of the respondent, that the term
“ ‘ heirs,’ being followed by the words, ‘ secluding assignees and
“ subtenants,’ can only mean heirs of line; and also that the words
“ ‘ have succeeded to,’ can only be applied to heirs of line, who alone
“ can be said to *succeed*, as no others can acquire the possession but
“ as disponees, to whom the term ‘ succeed’ is not applicable.

“ But it appears to me, that an assignee and an heir nominated
“ are very different characters, and that by assignee, in this case,

heir executed a general disposition in favour of his mother, conveying expressly to her the lease, and

"is meant that person who is an assignee, not being an heir nominated.

"With respect to the words 'who shall have succeeded,' and to which considerable meaning was attached by a noble Lord (Lord Rosslyn), I think that the heir nominated may as well be said to have 'succeeded' as the heir of line. Supposing that these words were to occur in a deed conveying a fee, it seems impossible to maintain that the term succeed would not apply to a disponee as well as to the heir of line.

"It has been contended for by the appellant, that by 'heirs,' is implied every one of the tenant's family. But although this may have been the intention of the parties, which I think probable, yet it cannot receive that interpretation in a judicial sense; and its construction must be confined either to the heir of line or the heir nominated.

"The point for consideration in this case, is, what is the meaning of the parties as to be discovered from the whole of the lease, taking it altogether.

"The prestations by the tenant are laid on him, his 'heirs, executors, successors, &c.' who would be liable to make good these prestations, while, according to the limited sense contended for by the respondent, the heir of line alone would receive all the benefit of the lease.

"From the particular circumstances of this case, it does not follow but it may be differently decided from Lord Minto's case, without interfering with the general principle thereby decided.

"The appellant having possessed the farm previous to the termination of the 38 years, he must have done so either as subtenant, disponee, or heir. During such possession, rent was accepted by the lessor, which in this country would have confirmed the possession, unless it had been received under protest; the lessor expressly declaring, that it was not to be considered as a confirmation of the possession. And it appears, that, on the same day on which this case was decided, the Court gave effect to this principle in another case. In that case, indeed, the tenant was many years in possession, but the principle must be as effectual, where there is only one payment, as where there are many. Yet no attention seems to have been paid by the Judges to this circumstance, and the opinions do not inform us why it was not attended to.

constituting her the general disponee and executrix—he also died, and she entered into possession.

“ When we are told that this case follows as a consequence of Lord Minto’s, there is the greater reason for having the point well settled, if that decision is to be considered as a surprise.

“ The Noble Lord who preceded me in my official situation (Roslyn) thinks it rightly decided ; but I have infinite doubts in my mind as to its propriety ; and when I consider the different and contradictory opinions of the Judges below, and the enormous importance of this case, arising from the number of similar cases, I would propose to remit the cause for farther consideration, directing the Court to review their judgment generally ; regard being had to the meaning of the word heirs, as used in all parts of the tack, and to the receipt of rent, also to the interest the elder brother may have in the farm.

“ From any thing I know of the form of proceedings in the Court of Session, it may be competent to Col. Cunningham, after having succeeded in ejecting the heir nominated, to say to the eldest son, Although you may be the heir of line, yet you are not the person described in the tack, who is the heir nominated, and not the heir of line. I have also great doubts whether, supposing the second son to be ejected, the eldest may not be entitled to the farm, although not in possession at the end of the 38 years. If the father had died the day before the expiration of the 38 years, and the eldest son had been then in Hamburg, so that it would have been impossible for him to be in possession at the expiration of the 38 years, could it be said, that in such case he was to be deprived of his right ? And, on the same principle, may he not plead the present cause, as having precluded him from the possession of the farm ? and that, as it was impossible for him to obtain possession, his interest ought not to be affected by the want of it.”

“ The judgment was in these terms : “ It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the cause be remitted back to the Court of Session in Scotland, generally to review the several interlocutors complained of, and to consider how far the meaning of the word ‘ heirs,’ as that word occurs in the several parts of the lease of 18th January 1759, and the general contents of that lease, may affect the construction to be given in this case, as to the words ‘ William Grieve and his heirs,’ and the words ‘ the heir or heirs

It was said on the Bench, that executors are, in the view of the law, only *hæredes facti*, not *nati*. But

“ of the said William Grieve, who shall at the end of the 38 years
 “ have succeeded to, and shall then be in the possession of the
 “ said lands, and whether any rent has been received by or for the
 “ respondent in this case, under such circumstances as ought to af-
 “ fect his right to succeed in this process of removing, and how far
 “ such right may be affected by any claim which the elder son and
 “ heir of line of the said William Grieve may have to the possession
 “ of the farm, if the appellant hath not right thereto.”

On reconsideration, the interlocutors were adhered to by the Court of Session. Several of the Judges, however, expressed great doubts of the soundness of the decision; and Lord President Campbell and Lord Meadowbank were in the minority. From notes taken by one of the Counsel at the advising, it appears that Lord Hermand, who was in favour of the judgment, said, “ The eldest son is entitled to this lease—the words are perfectly clear, and admit of no ambiguity in legal construction. The tack is to the tenant and his heir in heritage—to the son if there is only one—to the eldest son if there be more than one—to the daughters as heirs portioners if there be no sons, and this is what is meant by the terms ‘heir or heirs.’ This is agreeable to the general understanding of the tenantry in Scotland, and there is no hardship in it; because, if the tenant wish to call another than the heir at law, he can apply to the landlord, who, if there be no good reason, will consent to the change.” Lord President Campbell said, “ That he had the misfortune to differ from the majority in Lord Minto’s case, and was sorry to find it so often used to support what he considered to be bad law. A tack of long endurance to the tenant and his heirs simply, is an heritable right, and to be considered as a feu-right. In feu-right, clauses *de non alienando*, until the act 1745, were very common, now happily they are at an end; but even while they were used, it was never supposed that the vassal had not a right to settle his own succession. Lord Hermand says, the eldest son is heir of a tack; true! so is he of a feu. But does that exclude a settlement? The Court is confounding a settlement and an assignation. A stranger to the law of Scotland might think the deeds the same. In form they are so, but not in substance. Every lawyer knows the essential difference. The second son here taking under this

the Court, in general, thought this introduction of the word "*executors*," was unskilful, ignorant, and unauthorized, and that no real difference existed between this case and that of Grieve; and accordingly they decided against the tenant.*

The principle, of those decisions, however applicable to questions between landlord and tenant, does not apply to questions amongst the heirs of the tenant. The regulation is intended for the landlord alone, and being *jus tertii* to the heirs, they are not entitled to found on it; and no one but the landlord can object to the heir nominated by the tenant continuing in possession.^b The exclusion of assignees and sub-tenants is meant to secure to the landlord, the skill and capital of the tenant in labouring the farm, and is clearly intended solely for his benefit; it may be said to be the condition under which the tenant possesses, and he must submit to its consequences. But this

" deed is liable, as heir and representative; but an assignee would
 " not. It is not common sense to say, that the landlord may meddle
 " with the tenant's succession, more than that the tenant may meddle
 " with the landlord's. Why should you tailzie the tenant's lease?
 " By the doctrine contended for it also follows, that the tenant
 " has not the liberty of selecting one from amongst heirs portion-
 " ers. To such doctrine he never could assent. The eldest son may
 " collate; does this clause preclude him? The judgment goes on
 " a wrong principle, from not distinguishing between assignments
 " and deeds, *mortis causa*."

After this advising, the case was taken out of Court, by a compromise, in terms of which the second son was allowed to continue in possession. See Appendix to Fac. Coll. Vol. XI. Mor. Appendix *voce* Tack, No. IX. p. 17.

* Lowden v. Adam, 21st Nov. 1805. Fac. Coll. Mor. App. *voce* Tack, No. X. p. 18.

^b Hay v. Wood, 8th December 1801. Fac. Coll. Mor. p. 15297.

effect being given to the clause, neither justice nor expediency seems to require more.—It is not a clause in favour of the heir of the tenant—nor meant to restrict the tenant's power of regulating his succession :—the landlord, in securing the possession of the tenant during the currency of the lease, or during his life, never meant to do more, and cannot be understood to have created an entail in favour of the tenant's heirs at law; neither can it be presumed, that the tenant had any intention of bringing himself under a restriction to those heirs. There is no reason, then, why this clause should be so construed as to produce this effect; or why, contrary to the intention of the parties, to the common rules of law, (which allow a freedom of disposal of property at the death of the proprietor,) and to expediency, a tenant so situated should be prevented from exercising the right of a proprietor. A distinction between those conveyances which are meant to denude the tenant, and to introduce a stranger during the lifetime of the tenant, and those which are meant to take place only after the death of the tenant, would do justice to all parties. This reasoning has been strongly urged on one side, in the opinions which have been delivered in the Court of Session.

This, like every other question which can arise on a deed that is daily in use, in place of being left to be decided by arguments drawn from the nature of the lease, or from views of expediency, ought to be precisely fixed by the contracting par-

ties. The tenant ought to look forward to the possible contingencies of the period of endurance, and provide accordingly; nor is the power which the circumstances of the tenant's situation may render it proper for him to possess, in case of his dying during the currency of the lease, a power which ought to be denied to him, even where there is a strict exclusion of assignees and sub-tenants.

Another consequence, arising from an express exclusion of assignees and sub-tenants, is not less embarrassing, and it may occur where the tenant has no wish to dispossess the heir at law; but where the heir at law, at the death of the tenant, is an infant unable to assume the management of the farm. Is it to be conceived, that the law, out of favour to the heir, shall give him (even where he is omitted in the lease) the benefit of the lease for the period of its endurance, and yet prohibit him, where he has an express right, from making use of it in the manner most for his advantage? Or shall he be bound to the landlord, and at the same time deprived of the means which may enable him to perform those obligations? This latter result appears most unjust; but still the infant heir of the tenant is placed in a difficult situation; for although a manager may be employed, there may be no one to oversee him; and if he is under no control, were it not more for the interest of the heir to resign the lease at once? In general, this would be the most prudent measure; and hence, on the death of a tenant leaving an infant heir, the lease would either be returned to the landlord,

or it would go into the hands of a manager, and involve the affairs of the minor in inextricable confusion.

If, to avoid the dangers of such a management, the relations of the heir were to propose a permanent management during the pupillarity of the heir, by which the lease should be put into the hands of a person capable of conducting the business of the farm, and who should, in place of accounting for the produce, become bound to pay a fixed annual sum to the heir, until the heir himself were able to take the management; here, again, the terms of the lease might be opposed to the plan. The object cannot be accomplished by an assignation, or by a sub-lease, for these are expressly prohibited; and even the power of appointing a permanent manager seems to be questionable, and is a point on which the Court have hesitated. Nay, it would rather appear, as far as the case has hitherto been judged of, that, in the opinion of the Court, a permanent management is ineffectual against the landlord. In a case where the lease excluded assignees and sub-tenants, the tenant died, leaving an infant family, and the relations entered into an agreement (one of them being named *factor loco tutoris*) with a farmer for 13 years, or until the heir's majority, that he should relieve the family of all the prestations of the lease, give them house-room, potatoe-land, &c. and pay a considerable surplus rent; and the agreement had received effect for some years, when it was challenged by the mother of the children, who

had been appointed factor *loco tutoris* on the resignation of the former factor; and although the Court, in decerning in the action of removing, proceeded chiefly on grounds unconnected with the present question, yet much weight was given to an alleged disapprobation on the part of the landlord.*

It will probably happen, that the importance of agriculture, the extent of the capital employed, and the degree of information requisite in tenants, will in process of time be found to entitle this useful class of men to greater privileges than they at present enjoy. But certainly a tenant, who has agreed to surrender all power of assigning or sub-setting, would be extremely inattentive to the interests of himself and his children, should he not stipulate for a power of naming an heir, and of appointing managers during the minority of those who may succeed to him. These are powers which, in justice to himself, a tenant ought not to surrender, and which, in sound policy, the landlord ought not to refuse.

5. *The tenant's power of disposal of the lease.*—Anciently the landlord had a material interest in fixing upon the persons by whom his farms were to be possessed; his safety often depending more on the attachment of his tenants, than the efficacy of the laws; while, on the other hand, he was, in some degree, answerable for the conduct of those dwelling on his estate. These circumstances naturally introduced a very strict interpretation of the terms

* Boyd v. Alexander, 29th June 1802.—Not reported.

of the lease; but this state of society changed, the influence of good government was felt, protection was no longer required from the tenant, and the landlord was freed from responsibility. With this change a more liberal interpretation of this contract was introduced. Heirs came to succeed to leases which were not expressly granted to them; and the old notions having passed away, it was at last questioned, whether a lease for a term of years did not necessarily confer on the tenant a power of assigning or subsetting.

Assignment.—The question as to the power of assigning was early decided; and the Court refused to admit it where a power of assigning had not been expressly given.^a But although the power of assigning voluntarily is denied to the tenant, yet, unless there be an absolute exclusion of assignees, the lease may be attached by the diligence of creditors. Erskine says expressly, That, “although it cannot be voluntarily assigned by the tenant, it may be adjudged by his creditor, in favour of whom many things are indulged, contrary to common rules.”^b

Where a lease contains a prohibition to assign,^c

^a Hume v. Lyell, 18th June 1680. Stair. Mor. 10391. Lady Binnie v. Sinclair, 3d January 1672. Mor. 10382. Rattray v. Graham, 14th February 1623. Durie. Mor. 10356.

^b Ersk. Inst. B. II. tit. vi. § 32.

^c The prohibition to assign is thus expressed: THAT IS TO SAY, the said A has LET, and, in consideration of the tack-duty after-mentioned, SETS, and in tack and assedation, LETS to the said B and his heirs, but expressly excluding his assignees, (or sometimes

even the legal conveyance by adjudication has no effect. In a case where the tack expressly excluded assignees, except such as the landlord should approve, the Court found that the lease was not adjudgable. It seemed in this case to be held, that where there is a right of property in an estate, although a condition that does not limit the right of property, is no more than a personal prohibition, and does not bar an adjudger, yet, in the lease, which is a right, not of property, but of possession only, the same rule does not apply, and a condition there makes a limitation of the right: But, in another view, when a proprietor makes a grant, the will of the proprietor must regulate the terms of his grant. No person can hold property without the consent of the proprietor, nor can he hold it contrary to the terms of that consent; hence, if a proprietor has given to one the privilege of possessing his property, that privilege cannot be transferred to another contrary to the will of the proprietor. The Court, however, avoided the general point, and found "that this tack, as it expressly secluded assignees, is not adjudgable."^a This judgment was approved of, and followed in a subsequent case.^b And it has also been held,

the expression is, "excluding his assignees, legal or conventional;" and where this exclusion is made, "sub-tenants" is generally added), ALL and WHOLE, &c.

^a Elliot v. the Duke of Buccleugh, 14th December 1747. Kaima' Remarkable Decisions, No. 84. Kilk. p. 396, Falc. No. 217. Mor. p. 10329; and Elchies v. Tack, No. 12, Elchies' Notes, p. 444.

^b John and William Cunningham and Co. v. Hamilton, 21st November 1770. Fac. Coll. Mor. p. 10410.

where the lease was granted for 45 years, and a life to the tenant, "his heirs, executors, and assignees whatsoever, with whom the landlord shall be content, and accept of allennarly," that the tenant has no power to assign in security of a debt without the landlord's consent.^a

Thus, a lease to a tenant and his heirs simply, will exclude voluntary assignees, and an express exclusion will exclude even adjudgers. But there is a peculiarity here to which the conveyancer ought to attend; for, where the landlord expressly excludes assignees, but admits, as an exception to this, "*such as he shall approve of*," this exception may defeat the exclusion entirely. It is true, that in the case of *Elliot v. the Duke of Buccleugh*, which has just been quoted, and where the power of exclusion was thus modified, the Court did not attach any importance to the condition, and found, that even the legal assignee had no right. But the effect of such a declaration has been since judged of, and found sufficient to prevent the landlord from using his power of exclusion in an arbitrary manner.^b A long lease to the tenant and his heirs, in which assignees were excluded, unless they were such as the landlord "should be content with and accept of," was assigned by the tenant to his son; and the Court refused to re-

^a *Sanderson v. the Marquis of Tweeddale*, 24th November 1756. Fac. Coll. Mor. p. 10407.

^b *Hepburn v. Burn*, 14th February 1759. Fac. Coll. Mor. p. 10409.

move the son, in an action brought by the landlord for annulling his right. And in the 4th volume of the Dictionary, there is the following passage:—"The Lords found, in a similar case to that of Hepburn and Burns, where the heritor's consent was made necessary to the assignation, that the heritor was not entitled arbitrarily, or out of mere caprice, to withhold his consent, where the proposed assignee was in good circumstances, and otherwise unexceptionable."^a Although, therefore, the simple exclusion, when expressed in the lease, lessens the tenant's right, an exclusion of this kind has a contrary effect, and gives the tenant a greater power than where the lease is silent on the point.^b

^a Duke of Roxburgh v. Archibalds, 5th March 1785. Dict. Vol. IV. *voce Personal and Transmissible*. Mor. p. 10412.

^b Vallentine v. Sir A. Ramsay, 28th June 1791, *not reported*. In this case the lease was for 19 years, and a life, to the lessee, "his heirs and assignees, such assignees being always agreeable to and approved of by the lessor and his heirs." The lessee became insolvent, and executed a trust for behoof of his creditors, empowering his trustees to manage the farm, and, if necessary, to sell the lease. The landlord, who was a creditor, presided at a meeting of creditors, and signed, as president, a minute, resolving to sell the lease for behoof of the creditors. A sale was accordingly advertised, but before the day of sale, the landlord sent to the trustees certain written conditions, relative to the management of the farm, &c. on which, and not otherwise, he would consent to a sale or assignation of the lease. Those conditions hurt the sale, and the landlord himself became the purchaser of the lease, at an undervalue. The original lessee brought a reduction, on the ground that the landlord was bound, both by the clause in the lease, and by his consent at the meeting of creditors, to receive an unexceptionable assignee or purchaser, and that he had no power to withhold his consent arbitrarily, or to

The effect of this exclusion is still to be considered, where the prohibition has an irritancy annexed to it; and on the same reasoning that led the Court to exclude the legal assignee, in the case of Elliot against the Duke of Buccleugh, effect would no doubt be given to this irritancy; and while the right of the assignee would be defeated, the right of the original tenant would not be permitted to revive.

Here we are naturally led to consider the effect of this exclusion on a female tenant who mar-

anx to it such conditions as amounted, in effect, to a new lease, essentially different from the original one: That if the landlord could offer no good objection to the proposed assignee, he must receive him; and that the assignee so received came precisely into the place of the original lessee. The Court held, that the clause in the lease did not give the landlord the power of rejecting an assignee arbitrarily, and without good cause; but, independently of that, they held, that the landlord's unqualified consent to a sale having been once given at the meeting of creditors, he was not entitled afterwards to qualify his consent, by conditions different from those in the original lease.

It will be observed, that in the case of Hepburn v. Burn, the assignation was made by the tenant in favour of his son, the heir *ali-qui successurus*—a circumstance much relied on in the argument for the assignee. In the cases of Elliot v. the Duke of Buccleugh, Cunningham v. Greive, and some other of the cases above referred to, no argument whatever appears to have been founded upon the qualified exclusion of assignees. Those cases were argued as if the exclusion had been absolute. But from the cases of the Duke of Roxburgh v. Archibalds, and of Vallentine v. Sir A. Ramsay, as well as from the received opinion of lawyers upon the point, the doctrine in the text seems fixed, viz. That, where a lease admits assignees, *if consented to by the landlord*, the landlord cannot arbitrarily withhold his consent—the fair construction of such a clause, and the obvious intention of the parties, being, that if the consent is withheld, it must be withheld for some good reason. This opinion has been repeatedly expressed on the Bench.

ries; a question which has occasioned some doubt amongst our lawyers. Craig is of opinion, that if a tack be granted to a woman, and she afterwards marries, she may be removed, although it may have been a liferent lease; for, where the lease, which is *strictissimi juris*, is given to her so as not to admit of an assignee, she cannot, without the consent of the landlord, obtrude upon him a new tenant, that is her husband, lest the landlord should be forced to receive as tenant a person he does not choose to admit.^a Craig's opinion appears to have been followed in one case, where a tack to a woman, excluding assignees, was held to be voided by her marriage, and it was found that the landlord was under no obligation to repay any part of a grassum which he had received.^b This was a very strong case, for the landlord had drawn the rent for some years after the marriage without challenge.—Craig's opinion, and consequently the principle of this decision (which stands unsupported), are very strongly opposed by Lord Kaims, who not only shows that Craig, in other cases, was of opinion that a liferent lease was assignable; but admitting that it were not, his Lordship asks, "Can marriage operate an assignation of a subject which is not assignable?"^c Therefore, all the effect marriage can have, is to bestow the

^a Craig *de feudis*. Lib. ii. Dieg. 10. § 6.

^b Sir John Hume *v.* Taylor and Husband, 16th February 1734. Elchies, *voce* Tack, No. 2.

^c Rem. Dec. No. 84. Elliot *v.* the Duke of Buccleugh. Mor. p. 10329.

power of administration on the husband, leaving the tack to subsist in the wife as formerly. Lord Kaims' opinion is perfectly just; and appears to have been the ground of the decision in a subsequent case, where the lease was for 18 years to the spouses and the longest liver of them, and the heirs of the longest liver, expressly excluding assignees and sub-tenants; and declaring, that if any of them should sub-set or assign, the tack should *ipso facto* become null and void. The husband died; and, in terms of the destination, the tack fell to the wife who married a second husband, on which the landlord brought a reduction of the lease, on the ground that it had fallen by her marriage. But the Court held, that the tack was not irritated by the wife's marriage.^a

What has been said on the power of assigning applies only to the case of an ordinary lease for 19 years; for where the lease is granted for a lifetime, or for two 19 years, or for a period exceeding the ordinary endurance, a *delectus personæ* is not implied, and it is held that in such a case the tenant, unless expressly prohibited, is entitled to assign.^b

To bring what relates to the power of assigning into one view: 1. Where a lease is given for 19 years, or for any shorter period, to a tenant

^a Gillon v. Muirhead, 9th March 1775. Fac. Coll. Mor. p. 15286.

^b Ross v. Blair, 10th February 1627. Spottiswood, (Tack.) Mor. p. 10368. Hume v. Craw, 28th February 1637. Durie. Mor. p. 10371. Duff v. Fowler, 16th July 1672. Stair. Mor. p. 10282.

and his heirs, 'without mention of assignees, the tenant has no power of assigning; but the lease may be adjudged by creditors. 2. Where assignees are expressly excluded, the lease cannot even be adjudged; nor (as the law has been interpreted) can the tenant name an heir, to exclude the heir at law. 3. In expressing this exclusion, the effect of an exception "of such assignees as the landlord may approve of," will so far circumscribe the power of the landlord, as to oblige him to receive any assignee to whom the tenant may convey the lease, unless the landlord can show a good objection to the circumstances or character of the assignee. 4. A lease, excluding assignees even under an irritancy, will not, in the person of a female, be irritated by her marriage. And, *lastly*, A lease for the lifetime of the tenant, or for more than an ordinary endurance, will imply a right of assigning, unless that right be expressly excluded.

Sub-lease.—The tenant's power of sub-setting has been fully and deliberately considered by the Court;* and after a hearing in presence, with a

* *Alison v. Proudfoot*, 22d January 1788. Fac. Coll. Mor. p. 15290. In this case, Patrick Alison let part of the lands of Newhall, for 19 years, to James Wilson, "excluding his heirs, executors, adjudgers, and assignees, except in the event of his wife's surviving him; and, in that case, he shall have power to assign to her what years of the tack shall be then to run." James, accordingly, assigned the lease to Margaret Proudfoot his wife; and immediately after his death, she sublet the lands to Adam Litster, on which Mr. Alison, the landlord, brought a reduction of the sub-lease.

view to fix the point, it has been found that a tenant, though not expressly barred from sub-setting,

PLEADED IN DEFENCE.—The contract of location is not in its own nature intransmissible. In the Roman law, the lessee might have transferred his right to another, provided there had been no relevant objection to the character or circumstances of that other person. In ancient times, the lease was put on a different footing; but this arose from circumstances long since past. Landlords were then forced to rely on the fidelity of their tenants and retainers. They were responsible for the conduct of those who resided on their estates, and the nature of the prestations and services to be performed by the tenant, brought them closer together. Hence, the lease was considered as a contract, *stricti juris*; if given to a woman, it fell by her marriage, if to a man, it fell by his death, and was alike incapable of voluntary or judicial transmission. But now it is no longer the personal services of the tenant, or his peculiar qualifications, which the landlord has in view. His sole object is the rent which the tenant can pay; and the lease has been exposed to public roup. Hence the heir of a tenant is admitted, unless he be specially excluded. His creditors may adjudge the lease; the lease to an unmarried woman does not fall by her marriage; it has been found, that though a lease for 19 years excluded assignees, there might nevertheless be a sub-set; and the custom of excluding sub-tenants is a presumption in favour of the power of subsetting, when the lease is silent on that point. Besides, what purpose would it serve to exclude, by implication, a sub-tenant, when, from the nature of the lease, the landlord must now admit the heirs at law of the deceased, (heirs portioners, minors, idiots, or judicial assignees, ignorant of farming,) unless where they are expressly excluded.

ANSWERED.—Although some of the reasons which formerly contributed to give a limited interpretation to the tenant's right do not now exist, it is still of the utmost importance to landlords to have a power of rejecting, without assigning any reason, those with whose characters they are dissatisfied. A landlord, though not indebted for his personal safety to his tenant, nor answerable for the conduct of his tenant, must yet depend on the personal industry of his tenant for the regular payment of his rent, and on his qualifications as a farmer (now that farming has become a science,) for the right cultivation of his lands; and on his peaceable and neighbourly disposition, not only for his own quiet, but for that of the

had no power to sub-set; and this judgment has been repeated in another case, where it was far from being clear, that there was not in the custom of the estate, and the nature of the obligation, a power of sub-setting. The missives of lease referred to certain articles and regulations, established by the landlord for his leases on a particular estate, and, in these regulations there was neither an express permission to sub-set, nor a prohibition against it, though mention was made of tenants and sub-tenants, and, in another place, of tenants as distin-

other tenants on his estate; and there are innumerable cases where a man (to whose character and circumstances no legal objection could lie) might, as a tenant, bring the greatest inconvenience and loss on his landlord. The alterations on the interpretation of the lease have not gone so far as has been stated. A lease, where assignees are not excluded, may be carried by an adjudication, the favour due to creditors making an exception from the general rule; another exception has been introduced in favour of heirs; and it has been found, that a woman does not forfeit her lease by marriage, and that her husband, in her right, is entitled to manage the farm, a decision equally favourable to the proprietor and to the lessee. But all other restraints (unless where the lease is of such an endurance as puts them almost on a footing with rights of property) are still in force, without a power of assigning, assignees are excluded; and although in one case it was found, from particular circumstances, that an exclusion of assignees did not prevent sub-setting, no decision has favoured the opinion, that a sub-lease is effectual without an express allowance from the landlord.

This question came first before the Court on a petition and answers; then a hearing was ordered, when the Lords found, "That Margaret Proudfoot, the defender, had no right to grant the sub-lease under reduction, and therefore reduced the same." And this decision is said to have rested on this principle, "That in a lease of no greater endurance than 19 years, neither assignees nor sub-tenants were admissible, unless in virtue of a special paction."

guished from possessors ; and in a lease which had been formally executed between the landlord and another tenant, who had originally entered into a similar missive, the lease contained a power of sub-setting ; and it was admitted to be customary for the tenants on that estate to let small portions of their lands to sub-tenants. Under these circumstances, the Court affirmed the judgment of the Lord Ordinary, who, “ in regard it “ did not appear that the principal tenant had “ powers to sub-set his farm, decerned in the re- “ moving.”*

The same distinction is here to be made that was found to hold in regard to assignees ; for, although a lease for 19 years, where there is no power to sub-set, will not authorise a sub-lease, a tack of a longer endurance will entitle the tenant to sub-set. A tenant, who possessed a farm on a lease for 38 years, in favour of himself, his heirs and executors, granted a sub-lease, of which the landlord brought a reduction, founding on the law as established in the case of *Alison v. Proudfoot*. But the Court, on the ge-

* *Earl of Peterborough v. Milne*, 8th March 1791. Fac. Coll. Mor. p. 15293. In *Lord Cassilis v. MacAdam*, 5th December 1806,—Fac. Coll. Mor. *voce Tack*, App. No. XIV. p. 24,—The lease was for 21 years. This was held to be a lease of ordinary endurance, and the power of sub-setting excluded. It was strongly, but ineffectually pleaded, that *delectus personæ* in leases was now unnecessary and odious, and that the interpretation ought to be strict, limiting the landlord to 19 years, and empowering the tenant in a lease for any longer endurance to sub-set.

neral ground, That a power of sub-setting is implied in a lease of 38 years, unanimously sustained the sub-lease.*

A farther exception will be found wherever the lease gives a power of out-putting and in-putting tenants; for these words are held by all our lawyers to confer a power of sub-setting.^b And it may here be remarked, that a mere exclusion of *assignees* in a long lease will not be considered sufficient to exclude sub-tenants.^c

The power of sub-setting, then, is refused to a tenant under a lease of 19 years, without the necessity of expressing the restriction. But in a liferent lease, or in a lease of extraordinary endurance, the tenant possesses a power of sub-setting, if it be not circumscribed by the terms of the lease; and the power "*of out-putting and in-putting tenants*" is, in all cases, equivalent to the most ample power of sub-setting.

Sub-tenants.—It remains to be considered, with reference to the destination of the lease, whether (if assignees and sub-tenants are both excluded) it be in the power of the tenant, or his creditors, to

* *Simpson v. Gray and Webster*, 22d May 1794. Fac. Coll. M. p. 15294.

^b *Stair*, B. II. tit. ix. § 22. *Bankton*, B. II. tit. ix. § 17. *Erskine*, B. II. tit. vi. § 33.

^c *Trotter v. Dennis*, 22d Nov. 1770. Fac. Coll. Mor. p. 15282. This was not a positive decision; but the Court was of opinion, that there was a clear distinction between assignees and sub-tenants; as in the one case, the tenant was changed, in the other, not; and that an exclusion of assignees did not comprehend an exclusion of sub-tenants.

possess the farm under a manager, for behoof of those having interest.

This is certainly a most equitable power, now that large capitals are invested in farming; for, it is manifestly unjust, that a tenant, who may have contracted the debts that oppress him, in improving the farm, and which improvements are capable of extricating him from his difficulties, should, in the event of any sudden misfortune, be deprived of those means of relief, on which both he and his creditors had a title to rely. A lease, which should exclude such a power of management, without providing some other plan, by which full justice might be done to the tenant, would be highly fraudulent.

The expedient of appointing a manager for the creditors, is said to have been devised by Mr. Lockhart, afterwards Lord Covington; and to have been followed, under his directions, in a case which came afterwards to receive the decision of the Court. In that case, the lease was granted to the tenant, his heirs and successors, excluding assignees and subtenants. The crop and stocking were pounded for debt; and the creditors having consulted Mr. Lockhart, as to the measures which they ought to pursue, he advised them to appoint a factor or manager over the farm. In place of doing this, however, the tenant gave the right to one of his creditors, who had made some advances for behoof of the rest; and on these advances being repaid, the right was to be at an end. The Court decreed in an action of removing against

the tenant; and this is all that appears in the Faculty Collection.* But the matter was not allowed to rest here; and the question having been brought under review, and argued on this point, whether the tenant might not appoint a manager, the Court continued the tenant in possession.

The question was again considered, in a case where a mill was let to the tenant and his heirs, secluding assignees and sub-tenants, without the consent of the landlord; the tenant died, and his affairs being in disorder, his creditors endeavoured to make an agreement with the landlord, by which they might have the benefit of the lease, during the period then to run: But, finding this impracticable, they prevailed with the tenant's heir, to give a letter, empowering one of the creditors to manage and superintend the mill, and to act as freely, in all respects, as if the heir were personally present; and he was taken bound to account to the heir for his intromissions, after deducting his necessary expenses.—On granting this letter to the manager chosen by the creditors, the heir received from the creditors an obligation of relief from the consequences of thus representing the tenant; and it was declared, that the profits of the lease should go exclusively to the creditors.

When this manager began to act, a removing was brought before the Sheriff, who, on the ground

* Jamieson Durham v. Henderson and Livingston, 23d January 1773. Fac. Coll. Mor. p. 15283; and App, *vide* Tack.

that the heir was in possession, by means of his servants or mandatories; and that there was no clause in the deed requiring residence on the part of the tenant, dismissed the action. Lord Justice Clerk (M'Queen) adhered to the judgment of the Sheriff; and this judgment the Court confirmed.*

* *Laird and Company v. Grindlay*, 30th June 1791. Mor. p. 15294. Bell's Cases, 8vo. p. 296. In opposition to this judgment, it was said, that the restriction on the tenant was, that he should neither assign nor sub-set; and this must be understood as a virtual prohibition, to convey the lease under any form. That the bankruptcy of the tenant is one of the circumstances for which a declaration of this kind is meant to provide, and it was held to be the same, as if the landlord had, in as many words, declared to the tenant, that, in the event of his bankruptcy, the tenant should not enter into the possession of the farm; and unless the provision has this effect, there was said to be an end to the clause altogether. On the other hand, it was thought, that a landlord, if he meant to have none but substantial tenants, ought to insert a clause to that purpose in his leases, and should make bankruptcy a forfeiture of the lease: But without this, unless the tenant be in the situation provided for by the act of sederunt, bankruptcy alone creates no forfeiture. Suppose a lucrative lease, and that the tenant died a bankrupt, the heir may enter *cum beneficio inventarii*; and it would be no objection to his attaining the possession, that he was to derive no advantage from the lease, and that the profits were to go to the creditors of the deceased.—The heir would thus perform a duty to the creditors of the deceased which would be highly commendable; but this never could be urged against him as a ground for depriving him of the lease.—That, with regard to the interposition of a manager, there was nothing improper in that, nor could it be objected to on account of the seclusion of assignees. Many farms are possessed by a manager, where assignees and sub-tenants are excluded. Such were the grounds on which the judges seemed to proceed in deciding this cause.

Since the case of *Laird v. Grindlay*, this question has been several times under consideration of the Court. In one case the tenant had

If, therefore, this power is to be taken away, it must be done by an express clause, declaring the

projected improvements, and many years of his lease were unexpired. The lease excluded assignees and sub-tenants. The tenant died in great pecuniary embarrassment, and his brother entered *cum beneficio inventarii*, and named trustees for the creditors, allowing the whole profits of the lease to go in extinction of his brother's debts. The Court showed a disposition to follow the decision in Laird's case. The heir's entry, and the management of trustees for creditors (the tenant's residence not being necessary under the lease) were approved of, but the case was compromised before a final decision. Earl of Galloway v. M'Hutcheon, 6th June 1803. Not reported. Referred to in Watson v. Douglas, *infra*.

A lease expressly excluded assignees and sub-tenants, legal as well as voluntary. The tenant became bankrupt, and left the country, having before his departure granted a factory, empowering a regularly bred farmer to manage his farm, and his affairs in general, for behoof of his creditors. The Court removed the tenant, "in respect of the desertion of the farm, and that the factory in question seems to be of the nature of a covered assignment." *Monro v. Miller*, 11th Dec. 1811. Fac. Coll.

A tack for 31 years excluded assignees and sub-tenants—but there was no clause relative to residence. Early in the lease the tenant became bankrupt, and executed a trust in favour of his creditors, empowering his trustee to manage the farm,—The trust was to continue until the trustee was relieved of his advances. The tenant then left the country. The Judges were much divided in opinion. The endurance of the lease weighed with those Judges who were in favour of the tenant. The Second Division of the Court was equally divided upon the question; but after consultation with the Judges of the First Division, they removed the tenant. *Watson v. Douglas*, 13th Dec. 1811. Fac. Coll. Second Division. And the same principle has been followed, *Buchan Sydserrff's Assignees v. Todd*, 8th March 1814. Fac. Coll.

In Lord Dalhousie's case, which is usually referred to on this point, the *ratio* of the decision appears rather to have been the desertion of the tenant, than the nomination of a manager. *Lord Dalhousie v. Wilson*, 1st Dec. 1802. Fac. Coll. Mor. p. 15311.

It would rather appear that in judging of questions of this description, the expressed will of the contracting parties has been as-

bankruptcy of the tenant to be an irritancy of the lease: But, certainly, where such a clause is to be introduced, it were but justice to provide for the proper letting of the farm, and the appropriation of the surplus rent to the tenant or his creditors.*

sumed as the rule of decision, although it is evident that the uniform application of this rule must be attended with very different degrees of hardship. Where the lease is of long endurance, and the rent high; or where a grassum has been paid; or where improvements have been projected by the tenant, and, to a certain extent, carried into effect, it is a manifest hardship that the landlord should enjoy the benefit of that outlay which may have been the cause of the tenant's ruin. In such cases, no doubt, the tenant will have a claim for the ameliorations which he has made, but there are few cases in which that can be considered as an adequate recompense.

* The great difficulty in devising a plan for letting the farm, will consist in uniting the interests of landlord and tenant; for, on the one hand, it is obvious, that to dispose of the lease to the highest advantage, it ought to be put up to public roup, whereas, by this manner of disposing of it, the very thing happens against which the landlord is anxious to guard; he is deprived of the privilege of choosing his tenant; perhaps, it might reconcile these jarring interests, were the creditors to have a power of offering a new tenant, (and which new tenant would pay a premium to the creditors, and be preferred at a public roup, or in any way agreeable to the creditors;) the landlord, on the other hand, possessing a power of retaining the farm, on paying the same premium to the creditors, which the new tenant would have paid, had he been received by the landlord. In this way, the creditors would receive the full value of the lease, while the landlord, without suffering any loss, would be enabled to exclude an improper tenant.

It is settled that an express provision for the forfeiture of the lease, on the bankruptcy of the tenant, may be strictly enforced; and such a stipulation is, perhaps, the most effectual method of preventing all doubt upon the subject.

A removing was sanctioned under such a clause of forfeiture, without the necessity of a declarator of irritancy. *Copland v. Gordon*, 7th Dec. 1805. Fac. Coll. Mor. App. *voce* Tack, No. 11. In

3. THE DESCRIPTION OF THE SUBJECT.

The subject is described by its name, and by the names of the parish and county within which it is situated. It is usual, also, to describe the farm by its boundaries; by mentioning the state of the possession under the last tenant; or, by a plan and measurement: Where the farm is properly enclosed, or where it has natural boundaries, there is little difficulty; but, where this is not the case, perhaps, the safest rule for all parties, is to refer to the possession of the former tenant, which, being a matter of notoriety, will afford a certain rule for ascertaining the nature and extent of the possession. Where, again, there is a measure-

the last case upon the subject, however, some doubts were expressed as to the propriety of such a decision. Lord Meadowbank thought a declarator of irritancy necessary, and that the irritancy was purgable by the production of the bankrupt's discharge. But the Court proceeded upon the express terms of the contract, and upon the injurious consequences to agriculture, which might be prevented by the ejection of bankrupt tenants. *Forbes v. Duncan*, 2d June 1812. Fac. Coll.

The exclusion of assignees, how express soever it may be, can be pleaded by the landlord only. It is *jus tertii* to heirs or creditors. But although the creditors of the tenant cannot affect by their diligence a lease containing such an exclusion, yet they may force the tenant, by the terror of other diligence, to grant an assignation of his lease for their behoof. And it is entirely a question of prudence with the creditors, where there is a forfeiture in the event of bankruptcy, whether they ought not to avoid rendering the tenant legally bankrupt, and by continuing him in possession, attain their object by a private arrangement. By pursuing a different course, they put it in the power of the landlord to deprive them of all benefit from the lease.

ment, it ought never to be admitted into the description of the farm, without some qualifying words, to show that the contents are expressed in a demonstrative, and not in a taxative sense.*—The boundaries and extent of the farm would thus be accurately ascertained, without any danger from the errors which are almost unavoidable in such measurements: since those errors, though they may afford ground for a law-suit, where either of the parties are so disposed, can scarcely be of such extent as to occasion a serious loss.

In this part of the deed, the reservations, in favour of the landlord are inserted; and we ought to distinguish between those which are incident to this contract, and constitute a reserved right, independently of any reservation expressed in the lease, and those which are not incident to it, and which, of course, the landlord does not possess, unless they be reserved.

* "All and whole, &c.; containing, according to a plan and measurement thereof, made by land-surveyor, one hundred acres of Scotch measure, which plan has been docketed and signed by us, as relative hereto; AND THAT for the space of," &c.; (and then add these words at the end of the clause,) AND, in respect the parties have satisfied themselves of the ACCURACY of the said MEASUREMENT; the same is hereby expressly DECLARED to be the rule and measurement, by which all questions depending on the contents or size of the said farm, or any part thereof, as laid down in the said plan, shall be determined, whatever the real contents of the said farm, or any of the parts thereof, may be; and whether the same may exceed or fall short of the quantities expressed in the said plan or measurement."

Of the former kind, is the landlord's right to the mines and minerals, woods and planting, on the estate. The landlord, under this right, may search for minerals, sink mines, and work, and carry off the produce, or, he may cut down trees, and carry them off. Those privileges arise from the right of property remaining in the landlord, of which his granting a lease of the surface does not deprive him : But then, as he has given the use of the surface, the landlord, if he exercises these reserved powers, is bound in equity to indemnify the tenant for any damage which the surface may suffer in consequence of his operations.

Thus the exercise of the landlord's powers is burdened with the loss which they may occasion to the tenant ; and hence, in expressing this clause, there are two points which ought to be kept in view ; 1. The effect which may be produced on the tenant, by expressing in the lease a reservation of those powers ; 2. The necessity, where such operations to a great extent are in contemplation, that the landlord should express, in writing, the nature and extent of the reservation.

1. Where the lease contains an express reservation in writing, of the landlord's powers of seeking for and working minerals, &c. although it may contain no other power than what the landlord, at common law, and independently of stipulation, would enjoy, yet it appears susceptible of a broader construction ; and in virtue of such a clause, the landlord might argue that he was entitled to exercise those rights, without indemnify-

ing the tenant for any surface damage; for, as without such a clause, the landlord, upon paying those damages, might have wrought the mines; this clause being inserted, might be said to authorise his doing so, without paying any surface damage; for such a clause would be without meaning, if it did not confer on the landlord a greater power than he had already at common law.

I do not presume to say what effect would be given to this plea: It is sufficient to suggest the possibility of such a question; and, in the case which is subjoined in the notes, the effect of a similar clause in a feu-contract (which is in many respects analagous to a lease) will be seen.* The conveyancer, however, will not fail to express precisely, where such a power is reserved to the landlord, whether, if it shall be exercised, the loss is to be borne by the landlord, or by the tenant.

* Duke of Argyll v. his feuars, in Sheardale, 21st November 1788. Mor. p. 6573. The superior here maintained, that, having reserved a power of working the mines, he could not be liable in the damage thence arising, any more than he would be for the value of the ground occupied by a road, where he had reserved the power of making one through the ground feued; the Court found, that the superior had a right to work the coal under the land in question, in terms of the reservation in the feu-rights, without being liable in damages to the vassals, or their tenants occupiers of the surface. It is true, this judgment was afterwards altered; but the alteration proceeded on some specialty in regard to the practice which had taken place, and was held to give a meaning to the clause, which otherwise it would not have received. The Duke's tenants of the coal had been in use to give damages to the feuars for their operations, and this consideration entered into the view of the Court, in pronouncing the latter judgment; so that the point of law remains undecided.

2. It is also the duty of the conveyancer, where operations to a great extent on the part of the landlord are in contemplation, which may be carried on in the course of the lease, to reserve sufficiently broad and ample powers to the landlord; for it will be observed, that the power of searching for minerals, or of working mines, is absolutely necessary for enjoying the rights of property which remain in the landlord: but the working and manufacturing of the mineral, after it is brought to the surface, may be performed any where; and this manufacturing of it on the ground, not being necessary for enabling the landlord to exercise his reserved rights, the tenant may oppose these operations, and will be bound to do no more, than give a road for carrying off the mineral in an unwrought state. Where, therefore, the landlord means to reserve this power, he must do so by an express stipulation.*

There are besides other powers, which it may be proper for a landlord to reserve, and which can be

* A reservation of this kind may be thus expressed, "RESERVING ALWAYS to the said A and his foresaids, liberty to search for, work, collect, and carry away, or to burn, calcine, smelt, purify, or manufacture lime, coal, stone, marl, ores, metals, minerals, and fossils, of every description, with liberty to use any part of the said grounds for building workmen's houses, or others, erecting engines and mills, cutting water courses and drains, or making roads, and of doing whatever may be necessary for carrying on the said operations in all their parts; allowance being always made to the said B and his foresaids, for the ground so occupied, or for any surface damage, or other damage of any kind, which the said B, or his foresaids, may sustain, through the said operations."

done only by an express reservation. It may be necessary to straighten marches, and to exchange ground with a neighbouring heritor; to make new roads, or to widen old ones; or a power of feuing ground for houses and gardens, on the sides of a road, may be convenient.*

* A clause, embracing all these particulars, may be thus expressed:

“RESERVING ALWAYS to the said A and his foresaids, the liberty of
 “planting trees in the fences, and around the farm-yard and garden,
 “without paying any damage to the tenant therefor; with POWER
 “also to plant, to the extent of acres of the said farm in such
 “places as he or they may think fit, the tenant being always entitled
 “to a deduction from his rent for the ground so employed, at the
 “rate of per acre; and the landlord being further bound to
 “enclose the said plantation in a complete and substantial manner;
 “which fences the tenant shall be bound to uphold and maintain
 “during the currency of the lease, or, at least, as long as the land-
 “lord shall require; and on no account shall the tenant, during
 “the period he is required to maintain the said fences, allow his
 “cattle or sheep to pasture within the said enclosures. RESERVING
 “also power to the said A and his foresaids, to alter old roads,
 “and make new ones through the said farm, without being liable
 “to the tenant in any damage, unless in so far as the crop on the
 “ground may be injured, or a new enclosure rendered necessary;
 “in which cases the surface damage of that season, and the ex-
 “pense of the new enclosure, shall be paid by the landlord to the
 “tenant. RESERVING ALSO power to the said A and his foresaids,
 “to straighten the marches of the said farm, with the marches of
 “the adjoining farms, or with the marches of the lands belonging to
 “neighbouring proprietors; and whatever changes shall thus be
 “made on the said farm, a rateable and proportioned change shall be
 “made on the rent hereby payable, the same being either increased
 “or diminished, according to the advantage or disadvantage result-
 “ing to the tenant from the said operations; and which change on
 “the rent shall be fixed by arbiters, to be mutually chosen by
 “the landlord and tenant: AND the said A and his foresaids,
 “shall have the further POWER of FEUING off ground on each side
 “of the roads made, or to be made, through the said lands, to the
 “extent of feet from the roadside, the said feus being so

The landlord may wish to plant or enclose part of the lands, or he may wish to reserve a power of resuming possession of certain portions before the expiration of the lease. In all these cases great care must be taken in expressing such stipulations. The intentions of the parties ought to be distinctly stated, and, if possible, all doubtful forms of expression avoided. Many questions have arisen out of clauses on which one would be apt at first to suppose that sufficient caution had been employed. A lease, for example, provided, that the tenant should, "upon requisition, give up the offices, garden, and three of the parks adjacent to the mansion-house, on receiving an equivalent deduction yearly from the tack-duty, to be fixed by neutral persons mutually chosen." The landlord, after an interval of several years, and when the value of the lands had risen considerably, availed himself of this stipulation. It came to be a question, whether the abatement to be given to the tenant should correspond to the increased value of the subjects at the period when the landlord resumed possession? or whether the original stipulated rent ought to be the rule of deduction? The Court, although it was by no means certain, either from the clause itself, or from other circumstances, that the intentions of the parties were not different, found the tenant

"arranged as not to interfere with the entries to the different fields;
 "and the tenant receiving a deduction from his rent for the ground
 "sewed out, at the rate of per acre."

entitled to the rent which the subjects would have brought when the landlord availed himself of his privilege.* Another tack provided, that the landlord's eldest son might, if he chose, take the lands and houses into his own possession, at the expiration of eleven years from the term of entry, on a premonition of six months; but that, "unless such premonition is duly made, and the landlord's son himself enter into, and possess the premises at that time, it shall not afterwards be in his power to assume possession of the same during the currency of the lease." The eldest son, who was in the navy, made intimation in terms of the lease; but at the term of entry he was in active service. He wished to take possession, in the meanwhile, by means of his servants and managers; but the Court held that the clause required his actual residence.^b

This appears to be a rigorous interpretation of the clause. A person may be considered as in possession who possesses by his servants; and here the voyage, which prevented the son from entering immediately into possession, might terminate within a few weeks. From what passed on the Bench on a recent occasion, it is probable that such strictness of interpretation would not now be sanctioned. The recent case alluded to, related to a clause requiring the tenant's residence, under the

* Sharp v. Burt, 31st July 1788. Fac. Coll. Mor. p. 15262.

^b Whitson v. Duncan, 13th May 1795. Fac. Coll. Mor.

pain of an irritancy of the lease; and although judgment in that case went against the tenant, yet, it proceeded upon specialties, and the literal interpretation of such clauses was reprobated by several of the Judges.*

It is impossible to provide, by anticipation, such clauses as the various circumstances of the contracting parties may require; but the cases just referred to, and the many questions which have arisen on the construction of the clauses in this deed, point out to conveyancers the absolute necessity of considerate attention to the language which they employ in attempting to express the meaning of the contracting parties.

The tenant, in virtue of his lease, has a right, not only to the lands described in it, but to the commonities and servitudes connected with the lands; and, of course, where a division of commonity takes place, the tenant possesses that part of the common which corresponds to his farm. We might, at first, be led to think, that, as the tenant reaps a temporary advantage from the division of a commonity, he ought to contribute a proportional part of the expense, which the landlord has incurred in obtaining the division; but the tenant's new right is, in law, to be considered as no more than an equivalent for that which he enjoyed over the common, and, as the division creates a permanent right in the landlord, no claim ought to lie against the tenant for this

* *Stirling v. Miller*, 29th June 1813. Fac. Coll.

change, though it may appear to be favourable for him.*

While, therefore, the tenant enjoys the benefit of the division of a common, he is liable in no part of the expense of that division, without an express stipulation to that effect in his lease.

4. THE ENDURANCE OF THE LEASE.

AFTER describing the subject, the dispositive clause proceeds to fix the period of endurance.^b The material parts of this clause, relate, 1. To the commencement of the lease; 2. To those

* *Drummond v. Swanston*, 18th July 1782. *Mor.* p. 2487. The landlord argued, that the division of a common is a measure advantageous to all parties concerned; that amongst these, tenants, whose rights may endure for centuries, are certainly comprehended, and, that the expense should be defrayed by the landlord and tenant, according to their respective interests. To this it was answered, that, although a tenant might derive some consequential advantage from the division, he had not that interest in the property which the law required, before it imposed any part of the expense on a party. That the obligations between landlord and tenant are limited by the contract of location, which must exclude all adventitious claims between them. The proprietor's demand, in this case, was for the interest of the sum he had laid out during the currency of the lease; but the Court considered the claim as having no foundation in the Act of Parliament, and as little at common law; such an eventual benefit being too indirect to authorise the demand of a recompense.

^b "And that for the period of 19 years, from and after his entry thereto, which is hereby declared to commence at the term of
" &c.; and, from 'henceforth, to be peaceably possessed by the said B and his forebears, during the whole foresaid
" space."

breaches which may be made in the endurance; and lastly, To the different periods of endurance.

1. *The commencement of the period of endurance.*—By the English law, every estate for years must have a certain beginning, and a certain end; where no beginning is expressed, the lease is understood to commence from its date; and where the endurance depends on a life, it is void, as it is neither certain, nor even can be reduced to a certainty, during the continuance of the lease. This is the doctrine of the English law,^a but we have not viewed this matter so strictly.

Where no period of commencement was expressed, the date of the tack has, no doubt, been held to be the period of commencement.^b But in Scotland it is no objection to a liferent lease, that its endurance is uncertain. The lease, where there is no time specified, from which it is to commence, will be held to commence from the first term after its date.

In practice, the commencement of the endurance is very carefully expressed, and the terms of its commencement will depend, in a great degree, on the custom of the county in which the farm is situated, since the period of entry will regulate the period of removal; and were these terms to differ from those commonly adopted in the neigh-

^a Blackstone's Com. B. II. c. ix.

^b *Oliphant v. Peebles*, 4th December 1629. Mor. p. 11535.
Seton v. White, 13th November 1672. Fountainhall. Mor. p. 11235.

bourhood, a tenant might find himself (even where he had secured a new farm, at the end of his lease) deprived for some months of accommodation for his stocking. The period of commencement ought, therefore, to correspond with the usual terms of entry in that part of the country where the farm is situated.

The entry, in a corn farm, is different from that of a grass farm, and the terms of payment also differ; but this leads to questions which will be discussed, when we come to consider the effect produced by anticipating or postponing the term of payment.

2. *A Breach in the Lease.*—This puts it in the power of the tenant to give up the lease at a certain period; and is intended to relieve him, should he find himself unable to proceed with his agreement for the whole of the stipulated period. The propriety of granting such a privilege must be judged of by the contracting parties; but where it is given, the state in which the farm is to

* The breach is thus expressed:—"AND THAT for the space of NINETEEN YEARS, from and after his entry thereto, which is hereby declared to begin at ; and, from henceforth, to be peaceably possessed by the said B and his foresaids, during the whole foresaid space; PROVIDING ALWAYS and DECLARING, notwithstanding the period above expressed, for which this lease is declared to endure, that it shall be in the power of the said B and his foresaids, at the expiration of years, from the said term of entry, to quit and renounce this tack, and to be thenceforward free from the conditions thereof, PROVIDED he shall, previous to the term of , intimate to the said A, or to his foresaids, personally or at his or their dwelling places, under form of instrument, his intention to take advantage of the said breach."

be left, should the tenant avail himself of the breach, ought to be distinctly pointed out, and made the condition under which he can claim the privilege.

3. *The different periods of endurance.*—The ordinary period of endurance of the agricultural lease is 19 or 21 years; but it may be extended to any period: and where it is extended beyond the ordinary period, the question is, what will be the effect? 1. In all questions with the granter and his representatives, the lease will be effectual whatever be its period of endurance. 2. In questions with the singular successors of the granter, we have seen that the lease will be effectual against them, under the act 1449 only; and as that act requires a specific period of endurance, there must be a certain ish or termination, in order to render the lease effectual against singular successors. But, 3. It has not been precisely fixed by the decisions of the Court, what extent of endurance will annul the lease in a question with a singular successor under the act, or whether there be any restriction in point of time. 4. It has been fixed, where there is no period mentioned beyond which the lease shall not endure, that it cannot have effect against a purchaser; thus, were the lease to declare that the tenant's right shall endure for ever, it would not affect the purchaser; and the same rule will hold where the lease is declared to be renewable from period to period for ever. But although this indefinite endurance does not affect a purchaser, it has been found to be

effectual against the heirs of the grantor. 5. A *liferent lease*, that is, a lease to continue for the lifetime of the receiver, or of any other person, will be effectual to the tenant.*

In expressing the endurance of the lease, there is one case to which I may refer, as an instance of the effect of an option given to a tenant to choose either a certain period of endurance or a *liferent*.

* In England, where a lease is given during the lifetime of the tenant, as the term of his life is held to be an uncertain period, and therefore to be void, where given in our manner of expressing the *liferent lease*, they add a term of years, as, to B, for the space of 90 years, if he shall so long live. In our practice, the only difference in the *liferent lease* occurs in this part of the deed; we say, "And that during all the days of the said B's natural life, from and after his entry thereto, which is hereby declared to begin at the term of" But it is proper to observe, that a *liferent lease* differs so far from a lease for a short period, that, without expressing assignees or sub-tenants, it will confer on the tenant a power of assigning or of sub-setting; and therefore, where these powers are not meant to be given, they must be expressly reserved. Further, there is no occasion for an obligation to remove in the *liferent lease*; the particulars relative to the removing of those possessing under a *liferenter* will be afterwards adverted to, under the head of "Removing." One case may arise out of the *liferent lease*, which perhaps it were better to provide for—The *liferenter* sub-sets and leaves the kingdom, and there is no evidence of his existence or of his death: can the landlord remove the sub-tenant in such a situation? It is apprehended that he cannot; and that, before he can succeed in a removing, it will be incumbent on him to prove the death of the *liferenter*; for, the presumption in favour of life is such, as to secure the possession of the sub-tenant, until the period at which the *liferenter* would attain the age of 100 years, this being the period at which the presumption of life stops. To avoid so absurd a consequence, a clause may be inserted, obliging the assignee, or sub-tenant, to produce, at all times when required, within a fixed period, evidence of the existence of the *liferenter*.

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The case shows the propriety of fixing a period, within which the election, under such an alternative, ought to be made, for a lease being given to endure for 19 years, or for two lifetimes, in the option of tenant; and he having made no election at the end of 14 years, it was found, that he was still entitled to make his election.^a

III. THE CLAUSE OF WARRANDICE.

The next clause of the lease is the clause of warrandice, by which the landlord binds himself and his heirs to indemnify the tenant, in case he shall be deprived of his possession. This clause is very shortly expressed.^b The object of the view which we are now taking of the lease, is to observe such circumstances only, as may occasion a change on the clauses of the deed, without considering at present those questions which arise from the rights resulting from the different clauses. The clause of warrandice is one on which very material questions may arise, but it is one which seldom varies; and, in fact, the rights which it creates are so inseparable from the nature of the contract, that, independently altogether of this clause, they would belong to the tenant. It is, therefore, sufficient to say, that

^a Gray v. the Earl of Sutherland, 11th December 1765. Mor. p. 460.

^b "WHICH TACK the said A BINDS and OBLIGES himself, his heirs and successors, to WARRANT to the said B and his fore-saids, at all hands, and against all mortals, as law will."

under this clause, and consistently with the nature of the contract, the landlord is bound to secure the tenant's possession; and in the event of his being deprived of it, he is liable to him in damages. It appears, from several decided cases, that of old the tenant was held to be sufficiently indemnified for a partial or total eviction of the subject, by a proportional diminution of the rent. But now, when much of the value of a farm depends on the skill and capital of the farmer, it is not enough to relieve him of his rent, or of part of his rent; he must, in case of eviction, be allowed to prove the damage he has sustained, and that damage will constitute the amount of his claim under the clause of warrandice.

IV. THE OBLIGATION ON THE TENANT TO PAY THE RENT.

THOSE parts of the lease which we have been considering, refer to the obligations on the landlord. Those binding on the tenant are now to be considered, the principal of which is an obligation to pay the rent.^b

^b "FOR WHICH CAUSES, and on the OTHER PART, the said
"B BINDS and OBLIGES him, his heirs, executors, and successors
"whomsoever, to make payment to the said A and his fore-
"sails, of the sum of £ Sterling yearly, in the name of TACK-
"DUTY, payable at two terms in the year, Whitsunday and Mar-
"tinmas, by equal portions; beginning the first term's payment
"at the term of Whitsunday next, and the next term's payment
"at the term of Martinmas thereafter, for the first year's rent,

As the clause by which the payment of the rent is regulated may affect the interest, in point of succession, both of the landlord and of the tenant, and may also limit or extend the landlord's hypothec, it is proper, in order to point out the effect and operation of the clause now under consideration, to say a few words on those points. We shall have occasion afterwards to explain them more fully.

1. *The right of succession.*—On the death of the landlord, the rights of his heir and of his executor are thus arranged: In the *first* place, the rent which is due at the time of his death, belongs to the executor. *Secondly*, It seldom happens that the term of payment of the rent is so far anticipated, as to make it fall due before the crop is sown, and, of course, it has been necessary to fix on certain terms for regulating this question between the heir and executor of the landlord; the two terms, Whitsunday and Martinmas, have been accordingly fixed on for that purpose: these are called the legal terms, in contradistinction to the conventional terms; and whatever the conventional terms may be, the legal terms regulate the rights of heir and executor: Hence, should a landlord die after Whitsunday, his executor will have

"being crop and year ; and so forth, yearly and termly
 "thereafter, during the currency of this lease, with a fifth part
 "more of each term's payment of liquidate penalty in case of
 "failure, and the legal interest of each term's payment, from the
 "time that the same shall fall due, during the not payment
 "thereof."

right to one half of that year's rent, although the conventional term of payment should be postponed for a twelve-month. If the landlord should survive Martinmas, the executor will be entitled to draw the whole of that year's rent.

It is obvious, then, that the rights of the heir and executor of the landlord, are by no means affected by postponing the terms of payment of the rent, though they may be affected by anticipating them. Thus, for example, a tenant enters to a farm at Martinmas, and the first half year's rent is payable at Whitsunday following, the next half year's rent at Martinmas; in that case the legal and conventional terms correspond, and where the landlord survives Whitsunday, his executor has right to the Whitsunday half year's rent, not only because it was due at the time of the landlord's death, but because he survived the first legal term of payment. But, if we shall suppose the first half year's rent not to be due until Lammas, still the same rule will be followed; and the executors of the landlord will draw the first half year's rent because the landlord survived the first legal term, although he predeceased the conventional term of payment of that half year's rent. In this respect, it is that, by postponing the conventional terms, no alteration is made on the rights of the heir and executor. But there is still another case, viz. Where the tenant enters at Martinmas, and his first half year's rent is payable at Candlemas, and

crop 1800 to be payable at Whitsunday and Martinmas 1800, the landlord's right of hypothec over the stocking on the farm expires three months after the last conventional term of payment, that is on the 11th February ; whereas, should the rent be made payable at Lammas 1800 and Candlemas 1801, the hypothec over the stocking will continue for three months longer. These considerations ought to be kept in view in fixing the terms of payment.

In this clause, it is customary to make the rent payable under a penalty, and to make it bear interest, as an incitement to the tenant, and a means of insuring more regular payment.

With regard to the rent, there are some considerations which ought to be in the view of both parties. 1. The money rent is often made payable by the tenant in London, Edinburgh, or elsewhere, at the option of the landlord. It will be observed, that the consequence of this is, to expose the tenant to the risk of remitting the money to the place of payment; and should he send his remittance by a London or Edinburgh bill, and should the house on which it is drawn fail, or should the money be lost by any other accident, the loss will fall on the tenant. 2. Where the rent is payable partly in grain or meal, it is usual to declare, that it shall be of the produce of the farm; and, the rule in regard to the delivery of the victual is, that where the tenant is ready, and offers in due time to deliver the victual, the landlord, if he refuse to receive it, can demand only the *flars* of

the year, and should the grain perish by the delay, the loss will fall upon the landlord, through whose negligence it has arisen: where, again, the fault is on the part of the tenant, and he is not ready to deliver the victual, the landlord will be entitled to the ordinary prices of grain in the country; or, if the landlord has entered into a contract of sale, his part of which he has been unable to perform, in consequence of the tenant's neglect, the tenant will be liable in damages. 3. Where poultry are deliverable, or services due, their value ought to be convertible into money at the option of the landlord, not only in order to enable him to draw the composition, when he is not residing on the estate; but because in estimating the value of an estate, in a sale by a rental, the Court seem to make a distinction, and to allow those kains and services, for which money may be demanded, to be included in the rental for striking the price; while they refuse to sustain, as part of the rental, such kains or services as are to be performed or delivered in kind.^a 4. Sometimes a cautioner is bound along with the tenant for payment of the rent; and where the rent has been recovered from the cautioner, he is entitled to have a conveyance from the landlord of his right of hypothec, or whatever other security he may enjoy.^b 5. Rent ought not to be paid

^a Chalmers v. Cunningham, 13th February 1735. Dict. vol. ii. p. 366. Mor. p. 14159.

^b If the cautioner, for a tenant, pay without taking an assignation to the right of hypothec, which the landlord enjoyed for the

before it falls due; for the rent, which comes in place of the crop, belongs to the proprietor of the estate; and, therefore, were it paid prior to the regular terms, and were the estate to be sold or attached by the diligence of creditors, the new proprietor would be entitled to demand the rent from the period of his entry, notwithstanding the previous payments to the former proprietor; nor is a forehand payment of this kind effectual, even against an arrester; since to authorise this would occasion innumerable frauds.* The

rent, the other creditors of the tenant may arrest and exclude him; *Garden of Troup v. Dr. Gregory*, 24th January 1735. *Mor.* p. 2112; and *Elchies voce Hypothec*, No. I. and Notes, p. 194.

* These have been long established points. 1. It was found in a case reported by *Durie*, *Gray v. Campbell*, June 12, 1629. *Mor.* p. 10023,—“That rent advanced by the tenant, to the heritor, before the term of payment, does not liberate the payer, if the receiver be denuded of his right, in favour of another, before expiring of the said term; without prejudice of the tenant’s relief against the heritor.” And *Stair* reports a case, in which “it being the custom of a certain Barony, for the tenants, at their entry, to pay half a year’s rent; and so all along, half a year before the hand; this was sustained to a tenant against a singular successor; though it was argued, that no payment before the hand can liberate from a singular successor; because, who hath right to the land, hath right to the fruits extant upon the land, or growing after the commencement of his right, and, consequently, to the rent payable therefor; in respect, it was answered, That here, every year was paid within itself, and so the first year, the half at the beginning, and the half at the middle, and subsequent years conform, which must be sufficient to the tenant; otherways, tenants paying at Whitsunday and Martinmas should not be liberated, because the whole year is not run out; or, paying their farms at Candlemas should not be secure for the profit of grass thereafter, till Whitsunday,” *Dict.* vol. II. p. 52.—*Earl of Lauderdale v. Tenants of Swinton*, 7th Jan. 1662. *Stair’s Decisions.* *Mor.* p. 10023. So that, by law, the rent may be made payable, before the expiration

same rule holds in regard to sub-tenants. 6. Any right of retention of the rent given to the tenant, in payment of a debt due to him; or any allocation of that rent, in payment of a debt due to another; will be effectual against the granter and his heirs or representatives; but will have no effect against singular successors. 7. Although it would thus seem to follow, that all anticipation of the rent is ineffectual against singular successors, yet it is not understood that a grassum, paid by a tenant at his entry, though it be a general anticipation of the rent payable under his lease, affords any ground of repetition to the singular successor.* 8. A rent is required, to entitle the lease to the benefit of the act 1449; and this rent will be effectual for that purpose, though less than the annual value of the lands.

Connected with this obligation, is a clause which was formerly in use, declaring an irritancy, in case the rent should remain unpaid for two years. This irritant clause was common to leases and to feu-rights. Independently of the stipula-

of the year, of which it is the rent, but these terms ought not to be anticipated. 2. In regard to the diligence of creditors, which, as far as it is personal, does not rest on the same principle with the right of the new proprietor, but on expediency, it was found, so early as 1611, that a payment before the term, by a tenant, to an assignee of the landlord's, was not a relevant defence against an arrester. *Wilson v. Warrock*, 31st January 1611. Dict. vol. ii. p. 52. Mor. p. 10022.

* See the effect of grassum in leases under an entail. *Supra*, p. 107. Also in Appendix, where the result of the questions regarding the Queensberry leases is stated.

tions of parties, a lease might have been irritated by the tenant's incurring an arrear of two years' rent, but where there was no express stipulation declaring such an irritancy, the irritancy as in feu-rights was purgeable at any time before decree of declarator was pronounced; that is to say, the tenant might, before sentence passed against him, pay the rent, and free himself from the irritancy: But, where the irritancy was expressed in writing, it was held to be effectual, by the mere lapse of the time, and not to be purgeable at the bar.

Under the title Irritancy, in the Dictionary, will be found several early decisions, in which this irritancy was sustained.^a But without going over the names of the older cases, there are two of a late date, where this decision was pronounced. In the first of those cases, the irritancy was provided, in case the rent should remain unpaid for half a year after it became due; and a decree having been obtained before the Sheriff, in an action of declarator of irritancy, the Court would not open up that decree, and allow the tenant to purge the irritancy.^b In the latter case, there was a declaration in the lease, that the irritancy should not be purgeable at the bar; and the Court gave effect to this declaration, by refusing

^a *Laird of Gosford v. Sinclair*, March 1587. Colvil. Mor. p. 7181. *Hay v. Moffat*, December 1586. Colvil. Mor. p. 7236. *Sestoun v. Sestoun*, 24th March 1611. Haddington. Mor. p. 7184. *Merburn v. Nisbet*, 16th February 1665. Mor. p. 7229. *Powrie v. Hunter*, 26th July 1678. Stair. Men. p. 2695.

^b *Sir James Clerk v. Bennet*, 6th March 1759. Mor. p. 7237.

to allow the tenant to pay up his rent, and be released from the conclusions of the action.*

But notwithstanding those decisions, this irritancy would now be viewed by our Judges in a different light: in every case an opportunity would be given to the tenant of paying up his rent; even a decree in absence would not be thought an insurmountable bar; and nothing less than a decree, *in foro*, would preclude him from this indulgence.^b

In closing this subject, I may observe, that the cess is payable by the landlord, though sometimes laid, by agreement, on the tenant. Where it is payable by the landlord, but actually paid by the tenant, he ought regularly to deduct such payments at settling his rent. In a case where the tenant had been so negligent as to pay the cess, without deducting it from the amount of his rent

* *Finlayson v. Weir and Clayton*, 30th June 1761. Mor. p. 7239. Considerable doubts have been recently expressed of the judgment in this case, particularly by Lord President Blair. In one case the Court passed a bill of suspension, in order to try the question, but a compromise took place. *White v. Bremner*, 16th Nov. 1810. *Not reported*.

^b In deciding the case *Campbell v. Macalister*, 16th January 1777. Mor. p. 7254; and App. *voce Irritancy*, No. I.—the Court expressed an opinion, that irritancies of this nature are purgeable at the bar; and that though decree had passed in absence, and been extracted, it would have been hard, on that account, to have subjected the tenant to so heavy a penalty. It has been found, however, on a report from the Bill-chamber, in a suspension of a decree of removing, under the A. S. 1756, where a tenant was in arrear of one year's rent, and had failed to find caution in the Inferior Court, that he could not be reponed on offering caution in the Court of Session. *Kinloch v. M'Comie*, 16th June 1812. Fac. Coll.

at settlement, the Court, when, at the end of the lease, he made a demand for those payments of cess, thought themselves bound in law to presume, that those payments had been reckoned, in the settlements which had taken place between the landlord and the tenant, respecting the rent; and they refused to sustain the claim, except on a proof, by the writ or oath of the landlord, that they were still due.^a It will sometimes happen, that a tenant is taken bound to pay the rent, free of all burdens; and it may, in such a case, be questioned, whether this will relieve the landlord of the feu-duty. In one case, the tenant became bound to pay his rent free of all cesses, &c. and all other public burdens, *and other deductions whatsoever* imposed, or to be imposed; and yet it was found, that the tenant was not bound to pay the feu-duties of the lands, which were the subject of the lease.^b

V. THE OBLIGATIONS RELATIVE TO THE HOUSES ON THE FARM.

THE law, relative to the obligations on the landlord and tenant, in regard to the houses on the farm, is laid down by Mr. Erskine, in these terms:—The landlord is “usually obliged to put “all the houses and offices, necessary for the

^a Veitch v. Paterson, 2d December 1664. Stair. Mor. p. 11383.

^b York Buildings Company v. Grant, 26th July 1737. Clk. Hume, No. 72. Mor. p. 15338.

“farms, in sufficient condition at the tenant’s entry; and sometimes the tenant accepts of them, as sufficient by a special clause: and in whatever condition the tenant owns he has received them, he must also maintain them during the tack, and leave them in the same repair at his removal, unless the landlord himself undertake that burden in whole, or in part.” The

* The case to which Mr. Erskine refers, is so instructive on this point, that it is subjoined: “Whites v. Sir John Houston of that Ilk. Fount. 20th December 1707. Mor. p. 15258. These Whites, at their removing, having left the houses and mills ruinous, he takes a decree against them, for £280 Scots, in his own Baron court, as the damage sustained by him, and by poinding obtains payment. They raise a reduction of this decree, &c. &c.; and the testimony of the witnesses coming this day to be advised, it appeared, that, as to some of the houses, they were out of repair at their entry; but that £18 or £20 Scots would have made them sufficiently habitable, and wind and weather tight; and that they were 2 or 300 merks worse at their outgoing; but, as to other houses, they had meliorate and improved them considerably, for which they craved compensation to elide the damages, by suffering the other houses to fall into decay. The Lords found, that whatever operation or meliorations a country tenant made upon the houses, if habitable, for his own easier dwelling or accommodation, as striking out new windows, or glazing them, or making a halling to break the force of the wind, &c. he could claim nothing on that account; the master was obliged to him, but he could not retain his rent on that pretence, neither could he demolish or take them away, which is allowed to one who builds on another man’s ground, but not to tenants. And likewise found, by the nature of the contract of location and conduction, the tenant was bound to leave the houses in as good a condition as he gets them, and to uphold them during his stay, unless there be a particular paction derogating therefrom, such as the master’s being obliged to furnish the couples and great timber, as the custom is in some places.” Such were the grounds

"tenant, though he should enlarge the house, or build new offices, is entitled to no abatement of rent on that score, without a previous agreement with the landlord."

In the common case, then, the landlord will repair the houses, in such a manner, that the tenant may receive them from him, under an obligation to keep and preserve them in habitable and tenantable condition: Or, the outgoing tenant's obligation to leave the houses in sufficient repair, may be assigned to the incoming tenant; and it is then incumbent on him, in virtue of the powers conveyed to him, to see that the outgoing tenant fulfils his obligation. In some districts it is the practice to make an estimate of the value of the subject, at the time of the tenant's entry, and another valuation at the expiration of the lease, and the outgoing tenant either pays to the landlord, or receives from him the balance on the two valuations accordingly, as the subjects have risen or fallen in value; this, which is apparently

on which the judgment in this case proceeded, and it fixes, 1. That repairs for the accommodation of the tenant cannot be charged against the landlord. 2. That they cannot be taken away. 3. Neither can the value of them be set off against any claim, at the instance of the landlord, for the repairs necessary to put the subjects in the situation in which the tenant is bound to leave them. 4. That the tenant must keep and leave the subjects in the same state of repair in which he received them. 5. It seems to follow, that where the repairs are necessary for rendering the houses habitable, these repairs may be claimed by the tenant from the landlord.

* Ersk. Inst. Book II. tit. vi. § 39.

so fair, may, however, be converted to a purpose unfavourable to the landlord.*

* *Ducat v. Countess of Aboyne*, 14th May 1803. Mor. p. 15264. In this case the Mains of Halyburton were let in lease to Charles Ducat for 15 years, at the rent of £210, with a clause obliging him to leave the houses and biggings of his possession, in good, sufficient, and habitable condition at his removal, and to take the same under inventory, under this provision, "that if the said houses and biggings shall have been then found to have been ameliorated, the said Charles Ducat shall have allowance therefor from the said Countess of Aboyne." The tenant applied to the landlord for liberty to build a larger and better farm house, which was refused, whereupon he proceeded to take down the old house, with a view of rebuilding it. On this occasion, the landlord, under form of instrument, protested that, under the clause above recited, he should not be liable for the expense of the new house, or for any thing further than repairs.

At the expiration of the lease, a valuation of the houses was made, when it appeared that the value of the houses exceeded what they had been at the commencement of the lease, £215:4:8d. of which surplus the proportion corresponding to the new dwelling-house, was £137:15:9d. An action was brought for the whole surplus, amounting, as above, to £215:4:8d.

It appeared from a proof that the old dwelling-house had been uninhabitable, and stood in need of a thorough repair, that it consisted of no more than two rooms and a kitchen, and that the new house was of double the size, but was now of no use to the landlord, as he had taken the farm into his own possession, which was the reason he assigned to the tenant for not authorising the enlargement of the house, and for insisting that it should be repaired rather than rebuilt.

The Sheriff, before whom the question originally came, found, that the houses were necessary for the farm, and this judgment having been brought under review by a bill of advocation, which was reported to the Court with answers, the Court adhered to the Sheriff's judgment, by refusing the bill.

The prevailing opinion appears, from the Faculty Collection, to have been, that as the old house had become ruinous, a new one was necessary, and although the one in question was double the size of the former, the addition was not considered as unreasonable,

The conveyancer ought therefore to be very careful of the manner in which he expresses this clause, so as to avoid the possibility of bringing under it whatever new buildings the tenant may choose to erect. Sometimes a sum is allowed to the tenant for repairing the houses, and putting them in proper tenantable and habitable condition: But it will be remembered, that where a sum is in this way given to the tenant, or where he is allowed to retain a certain sum for repairing the subjects, he will not, without a particular obligation to that purpose, be bound to produce vouchers for the repairs; but having put the subjects in repair, although at a less expense than that which has been allowed, he will be held as having performed his obligation.* The obligation

and was therefore a melioration.—On the other hand, some of the Judges did not consider themselves at liberty to inquire what was proper for the farm, but what was actually agreed upon; and in this view, if the old house was ruinous, the erection of a new one would be a melioration, for which, by the tack, the landlord was bound to pay; but in so far as it exceeded the old one, they considered it as a new subject, and not a melioration of the old one, even had the tenant repaired the old house, and built an additional room, he could not have made his demand under the clause in the lease, and in all such cases, it was said, that the Court ought to avoid making a bargain for the parties, different from that which they themselves have made and acted upon. On this reasoning, the minority would have given the expense of building a house of the same dimensions with the old one, but nothing more.

* *Dalziel v. Lockhart of Cleghorn*, 25th June 1765. *Mor.* p. 15260. The circumstances of this case are thus shortly stated in the *Fac. Coll.* vol. iv. No. 18. “George Dalziel and Mr. Lockhart of Cleghorn having agreed about the conditions of a tack of certain lands belonging to the latter, one of which was, that a stipulated

upon a tenant to keep the subjects in repair, must always be understood with reference to the natural decay occasioned by time; and it is only the ordinary repairs that he can be forced to make. It is not meant that the subjects should be intrinsically worth as much, at the expiration of a long lease, as they were at its commencement; the timber work may be half worn, but that is not a decay to which the obligation on the tenant extends; and if the house be in a tenantable condition, (a term not very well defined) nothing more can be required of the tenant.

The tenant is not liable to repair the damage arising from such extraordinary accidents as were not in contemplation of the parties, and could not therefore form any part of their contract. As where the subject has been destroyed by lightning; by a hurricane of uncommon violence; by accidental fire; or by any other unusual or unlooked for occurrence.

The hurricane in January 1739 gave rise to several questions of this description. In one case, a tenant had received £150 from the landlord, in consideration of which he came under an obliga-

sum should be allowed to the lessee, for the expenses he might be obliged to lay out in the reparation of the houses on the farm: A process being afterwards commenced upon the different constructions to be put upon the terms of the tack, it was found unanimously, that the landlord could not oblige the tenant to produce particular accounts of the expenses he had been at, provided he had fulfilled the terms of the tack in properly repairing the houses, and putting them in a habitable condition."

tion to put the subjects in repair, and to keep them so during the lease. The tenant admitted that his obligation extended to the damage arising from a storm of ordinary violence, but that in framing this obligation, a storm of such extreme violence as that in 1739, never could have been in the contemplation of either of the parties. The Court, in these circumstances, held that the tenant was entitled to a sum for repairs in addition to the sum which he had already received.*

A similar judgment was pronounced where there was a clause in the lease, binding the tenant to keep the houses in repair; but the Court expressly limited the tenant's claim "to such of the houses as were damaged to an extent exceeding the effect of storms in use to happen in this country, but as to such of the houses as were not damaged beyond what might be supposed to happen in an ordinary storm, the tenant has found liable to repair."^b

* *York Buildings Company v. Adams*, 5th July 1741. Clerk Hume's Coll. Mer. p. 10127.

^b *Clerk v. Baird*, 10th July 1741. Milk. voc. voce *Periculum*. Mer. p. 10128.

With regard to the destruction of the subject by accidental fire, there are two late cases in which the law upon that point has been deliberately considered, and the question ultimately settled, by a decision in the House of Lords.

In the first of these cases, the Tack bound the tenant to keep the houses upon the farm "*in tenantable and habitable repair*," &c. The farm house was burnt down by accident. Both landlord and tenant wished it rebuilt, and the question was, by which of the two the expense of rebuilding should be defrayed. The Court, proceeding chiefly on the maxim "*res perit domino*," held that the landlord must rebuild at his own expense. There was, how-

We have, in these cases, an illustration of the nature and extent of the tenant's obligation. He must make repairs which become necessary from ordinary causes; where they are occasioned by

ever, much difference of opinion among the Judges. Lord Newton thought that the usual obligation undertaken by the tenant, as to keeping the houses in repair, laid the burden of rebuilding upon him. The maxim *res perit domino* might be correct, but "*pacetum tollit legem*." Lords Glenlee and Polkemet thought that the party wishing the house might rebuild it, but that neither party could be compelled to rebuild. The majority of the Court, however, including the late Lord Meadowbank, laid the expense of rebuilding upon the landlord. *Swinton v. M'Dougal*, 16th Jan. 1810. Fac. Coll. See the Report, in which the opinions of the Judges are fully given.

In the other case, also, the farm-house had been burnt by accident, and the tenant required the landlord to rebuild it, or to allow him to do so, and to retain the expense from the rent. The landlord declined to rebuild, or to defray any of the expense of rebuilding. But the Court of Session held, that the tenant was entitled to a house on his farm, the want of which might expose him to very great inconvenience; and proceeding, as in the former case, on the maxim "*res perit domino*," they found, that the landlord was bound to rebuild at his own expense. *Bayne v. Walker*, 30th May 1811. Fac. Coll.

On appeal, however, this judgment was reversed. The question decided by the House of Lords, was the simple one, which of the two parties shall rebuild? for, in this case, the tenant did not ask any abatement of rent on account of the loss, or relief in any other way. Lord Redesdale held, 1st, That the meaning of the maxim *res perit domino*, on which the judgment in the Court of Session proceeded, was, that no one was bound to answer the consequences of the accident. The subject perishes to each, according to his interest in it, each being *dominus* to that extent: That, otherwise, no distinction can be made between a nineteen years' lease—a liferent—and a lease for a thousand years, although the distinction in equity and justice is obvious. The rule also would apply equally at the beginning and at the end of a lease, and, consequently, with very different degrees of hardship to the landlord. If (asked his Lordship) a liferenter let for years, and the house is burnt, shall the life-

extraordinary causes, they fall on the proprietor. The obligation on the tenant respecting fences is, both at common law, and in general by express stipulation, the same as that with regard to the houses on the farm. The tenant is, in the ordinary case, bound to leave the fences in sufficient repair. The extent of this obligation, however, will be regulated by the condition in which he finds them at his entry.*

renter rebuild both for his own tenant and for the *fiar*? 2d, The usual obligation imposed by a lease upon the tenant with regard to keeping the houses, &c. in repair, it is admitted, cannot apply to such an accident as this, or to any extraordinary damage; and why should a different rule apply to the landlord, where the hardship may be greater? Legal presumption is admitted to qualify the tenant's obligation, and ought also to qualify the landlord's. 3d, The landlord may have to consider whether the house to be built should not be very different from the old one; and is the tenant to enjoy all the advantage of a superior house, perhaps during a long lease, without paying any additional rent for it? The loss of the house does not entirely destroy the use of the farm to the tenant; and the inconvenience differs according to the endurance of the lease after the accident. The rule ought to be, that if, from the magnitude of the loss, the tenant finds that he cannot remain, then let him remove, and this of course will produce questions as to meliorations, &c. not involved in the present case. Or the tenant may have an abatement of rent proportioned to the loss, an abatement which, in this case, he has not sought. His Lordship did not think that the decisions quoted had any application to the circumstances of the case.

Lord Chancellor Eldon agreed with Lord Redesdale as to the maxim *res perit domino*. There was here no question as to how the tenant ought to be indemnified for the loss of the house; and the whole question ought in future to be avoided by an express stipulation in the lease, as in England. This case was held by the House of Lords as fixing a rule for decision, in similar cases, for the future. See Dow's Reports, Vol. III. p. 234.

* Where a tenant has been at the expense of erecting new fences voluntarily, and without any obligation to do so, it seems hard

Where the tenant undertakes to erect houses or fences at his own expense, on condition of being repaid at the expiration of the lease, it may be requisite, with reference to the case of a sale during the currency of the lease, and to the questions which may arise between the seller and the purchaser, distinctly to point out who is to be considered as the debtor in the obligation of repayment. We have seen already, that questions of considerable difficulty may arise upon this point, and it is better to provide against them by an express stipulation.

VI. OBLIGATION RELATIVE TO THE MANAGEMENT OF THE FARM.

Proprietors frequently prescribe plans for the management of their farms, which the tenants are in general compelled to follow by penalties or by additional rents.—There are two questions; 1. What are the conditions to which the tenant ought to be bound? And, 2. In what manner can these conditions be most effectually enforced?

1. The conditions imposed on the tenant prescribe to him rules of management, and point out

to hold that he must either remove them altogether, or leave them in good repair. Yet so it has been found, where the tenant was bound by his lease "to uphold the fences and dykes, and to leave them in proper repair." *Andrew v. Morrison*, 19th Jan. 1811. Fac. Coll. The same holds with regard to march fences, where they have been in existence at the tenant's entry. *Dudgeon v. Howden*, 23d Nov. 1813. Fac. Coll.

the plan by which he is to labour and manure the farm, and the rotation of crops which he is to follow; or, they may be of a negative nature only, and calculated to prevent him from running out and exhausting the soil. A plan of management, to which the tenant is, under every change of circumstances, bound rigidly to adhere, has been reprobated, as an attempt to control what must depend on the seasons, and for which no human foresight can provide. It is complained of, as depriving of the power of management the person chiefly interested, while it excludes all improvement, and throws a ruinous restraint over the operations of the tenant. In opposition to this reasoning, it has been urged, that a plan of management laid down with judgment ensures a rotation of crops, which must prove beneficial to the tenant, at the same time that it must secure the interest of the landlord, and leave the farm in good condition at the expiration of the lease.

It belongs to those conversant with agriculture to determine this point; but, without presuming to decide, it is evident that the plan cannot be of a nature so general as to comprehend all cases. A plan of management, wherever it is applied, must be arranged for the farm on which it is to be executed, and must necessarily be affected by the soil and condition, and by the situation of the farm; no general plan can be proposed, and where one is prescribed for a particular farm, it is the conveyancer's duty to express the terms of it in plain unambiguous language, and to secure the observance of it by proper clauses.

But a set of negative regulations are not in the same situation with such plans of management, and they seem highly necessary on the part of the landlord. There are many situations in which the interests of landlord and tenant are opposed; of course, there are many subjects of dispute; it is therefore no more than a reasonable precaution to prevent the tenant from injuring the interest of the landlord. Even in the forms of the lease, as approved of by those who are hostile to restrictions on the tenant, there is often inserted a clause by which the tenant is prohibited from "raising above two successive crops of any of those sorts of grain, usually known by the name of white crops, the principal of which are wheat, oats, barley, and rye, from any part of the said lands, without the intervention of some kind of green crop, with or without a fallow complete;" and by which he becomes bound, "not to deteriorate or run out the lands, but to restore them at the expiration of the lease, in good heart and condition." Whether such a clause be a sufficient safeguard to the landlord I presume not to say; but it proves, at least, that in the opinion of those who are most decidedly against fettering the tenant, a clause which may protect the interest of the landlord is proper and necessary.

A very ingenious device, in order to free the tenant from restraint, and, at the same time, to protect the interests of the landlord, was contrived by Lord Kaima. This plan cannot be better introduced to the notice of the reader, than in the words of a man, to whom every one acquaint-

ed with agriculture, either practically or scientifically, will listen with attention. Speaking of the manner of reconciling the opposite interests of the landlord and tenant, Dr. Anderson says, " To effect these things appeared to me, for a great many years, to exceed the power of human ingenuity to devise. It has been done; and the public are obliged to the late Lord Kaims for this excellent device. His Lordship proposed, that the lease should extend to an indefinite number of years, consisting of fixed periods, at the end of which a rise of rent should take place, with permission to the tenant, at the period of each of these rises of rent, to give up his farm if he shall see proper; and granting a similar power to the landlord, upon proper terms, to resume his land if he shall think fit." Dr. Anderson then explains more fully the nature of the lease; and he concludes with this observation:—" Such are the outlines of that plan of a lease, that his Lordship has proposed: by this plan, the tenant's hands are not tied up by restrictive clauses, dictated by ignorance, under the pretext of securing the interest of the landlord. His interest is secured in a much more effectual manner, while the tenant is left at full liberty to avail himself of his knowledge, his skill, and his industry. Instead of ceasing to begin any arduous undertaking, as he ever must do where he has no lease, or of beginning to improve, for a few years only,

* General View of the Agriculture of Aberdeenshire.

“at the commencement of his lease, but stopping
 “short while in the midst of his career, and then
 “running it down to the same exhausted state,
 “as it was at its commencement, he continues
 “to push forward without ever stopping, and ad-
 “vances even with an accelerating progress for
 “an endless period of years. No person but an
 “experienced farmer, can conceive the difference
 “that would be between the productiveness of
 “the same land under this management, at the
 “end of an hundred years, from what it would
 “have been if let even for detached periods, of
 “twenty-one years each. In unimproved waste
 “lands, the difference would approach to infinity.
 “In lands which were originally very rich, the
 “difference would be less considerable; but in
 “all cases where cultivation could take place,
 “the difference would be very great.” Such
 is the opinion of a most intelligent and well in-
 formed writer on the subject; an opinion which
 entitles this form of the lease to the serious con-
 sideration of the landed interest of the country.*

2. *The means of enforcing the plan of manage-
 ment.*—Every specific act which a person becomes
 legally bound to perform, may be enforced by
 means of personal diligence. Under the clause of
 registration in a lease, it might, therefore, be
 thought that a landlord might compel implement
 of conditions relative to management: But this is
 obviously an impracticable method of enforcing

* See Appendix to No. II. where a fuller account is given of this lease, and an attempt made to reduce it to a practical form.

such obligations. The contravention would, in almost every case, require to be established in a regular action; and, if a more summary proceeding were attempted, from the very nature of the obligations attempted to be enforced, there would always be sufficient grounds for a suspension of diligence.*

The most obvious and most natural expedient, in such a contract, is, to provide an additional rent for such ground as may be laboured differently from the plan prescribed; and the only danger is, that a regulation of this kind may be considered as a penalty rather than as a rent; for, should it be considered as a penalty, a very troublesome question might arise, and a proof of the extent of the damage would be necessary.

Yet, there does not seem to be any inconsistency, or any thing contrary to the nature of the contract, where a landlord sets his farm at so much an acre, on condition that it shall be laboured according to a certain plan; but that if the tenant shall depart from that plan, and labour the farm, or any part of it, differently, then he

* A departure from a prescribed course of management will also expose the contravener to an action of damages. But even this affords imperfect security to the landlord. In order to bring such an action effectually, he would be under the necessity of superintending the tenant's operations more closely than he might wish. The tenant, too, might have it in his power to urge many pleas in mitigation. Or a delay, perhaps, in raising the action might enable him successfully to plead acquiescence on the part of the landlord. See *Murray's Trustees v. Gordon*, 26th February 1806. Fac. Coll. Mor. App. voce Tack, No. 12.

shall pay so much more for each acre brought under a different plan of management.* The rent

* The decisions of the Court seem to sanction this opinion.—An obligation relative to ploughing, with this addition; “and if you shall plough any more there, you hereby agree to pay me £100 Scots for each acre, and proportionally for less,” was enforced to the full extent against the tenant who had contravened, although the additional rent was greatly disproportioned to the damage sustained by the landlord. *Pollock v. Paton*, 24th February 1777. Fac. Coll. Mor. Appen. *voce Tack*, No. 4.

A clause, prescribing a particular course of management, with “*power and liberty*” to the tenant to pursue a different course on paying £2 of “*additional rent*” for each acre laboured differently, was literally construed against the tenant, although the additional rent was greatly beyond the value of the subjects. *Graham v. Balgowan v. Straiton*, 1787, House of Lords, 1789. Note to Report of M’Kenzie v. Gilchrist, 13th Dec. 1811. Fac. Coll.

Double rents exigible in case the tenants shall remain beyond the stipulated expiration of the lease, have also received a literal interpretation as being highly expedient, although it seemed to have been the opinion of the Court, that where a rent, “altogether exorbitant,” was stipulated, they might interpose their equitable powers to modify it. *M’Intosh v. M’Donell*, 1st February 1798. Fac. Coll. Mor. Appen. *voce Tack*, No. 5. *Hart v. Anderson*, 19th February 1796. Not reported.

A tack prescribed the course of labouring, “under a penalty of £3 sterling for each acre laboured otherwise than as above, to which the damages are hereby estimated without power to any judge to modify them on any pretence whatever.” Judgment went against the tenant who had contravened, the Court refusing to modify the sum to the actual damage—but here the sum awarded against the tenant was trifling. *Henderson v. Maxwell*, 24th February 1802. Fac. Coll. Mor. p. 10054.

A tenant bound himself to labour the farm, “according to the rules of good husbandry, and, in particular, never to take two white crops in succession from any part of the lands.” Should he contravene, he bound himself to pay £4 sterling of additional rent for each acre laboured contrary to the stipulations, and that for all the subsequent years of the lease. “But declaring that although an additional rent is hereby stipulated, the landlord, &c. may put a stop to such labour or cropping contrary to the stipula-



of a farm in grass, and the rent of the same farm with a liberty of ploughing, will be different; and there is no impropriety in stipulating different

"tions, in such manner as accords to law." The lease was for 19 years; and in the 6th year, the tenant laid down 6 acres, which he had carefully prepared and manured, in wheat, with grass seeds;—4 acres of the grass crop failed, and in the subsequent year, the tenant sowed barley and grass on these 4 acres.—The landlord availed himself of the literal terms of the lease, and insisted that for this accidental and harmless deviation from the prescribed course of cropping, the tenant should pay £4 of additional rent for these 4 acres during the whole of the subsequent years of the lease. This manifestly was not such a deviation as the additional rent was intended to guard against; and the amount of the sum, together with the landlord's power of interrupting the course of management for which the additional rent was provided, rendered the stipulated sum, although nominally an additional rent, yet virtually of the nature of a very heavy penalty. The Court, however, refused to interpose, and held that the bargain which the parties had made for themselves, however hard in its consequences to the tenant, was binding upon him to the full extent. *Fraser v. Ewart*, 25th February 1813. Fac. Coll.

By these decisions, it appears to be fixed, 1st, That even where the conditions of the lease are enforced under an express penalty, the Court will interfere with reluctance; and in extreme cases only, to modify the stipulated penalty to a sum different from that which the parties have fixed on as the price of a contravention.

2d, That a clause stipulating an additional rent, in order to enforce the conditions of the lease, will be literally interpreted, even where the additional rent has been accidentally incurred; and, although from the powers reserved to the landlord, and from its disproportion to the actual damage sustained, it should amount to an exorbitant penalty.

The preceding judgments have been pronounced *after* a contravention had actually taken place; but,

3d, It seems also to follow, from recent decisions, that unless an alternative be given to the tenant, in the most unequivocal terms, and whether the lease bear a penalty or an additional rent, the Court will interpose to enforce the prescribed course of management, where the tenant's intention to deviate is discovered, or intimated *before* the deviation has actually taken place.

rents, according to the manner in which the farm is to be occupied. A tenant (possessing under such an alternative) should he plough, must be

A lease contained the following clause:—"And the said tenants and their foresaids, hereby become bound to keep regularly and constantly after the first five years following their entry to the said farm, a fourth part of the arable part of their said farm either in hay or pasture, or an *additional rent* of 40s. sterling, to be paid by them to the proprietor, over and above the current rent, for each acre of said fourth part of their farm, they shall neglect to keep in grass, as above specified."—There was also an obligation to manage the farm in the last five years of the lease, according to the same course of good husbandry "as during the immediate preceding years." In the last year of the lease, the tenant intimated to the landlord, that he meant to avail himself of the alternative, and to plough up all the grass." The landlord opposed this intended proceeding, on the ground, that the additional rent was intended as a penalty, to guard against the commission of a wrong; and the Court, without fixing very precisely whether the stipulated sum was to be regarded as a penalty, or as an additional rent, found, by a small majority, that the landlord had a right to interrupt the tenant's operations. *Muir M'Kenzie v. Craigies*, 18th June 1811. Fac. Coll. Second Division.

Another lease contained a clause relative to the management, with a declaration, that "in case the tenant *shall fail*" to pursue the prescribed course, an *additional rent* of £2 per acre shall be paid. The tenant, as in the former case, intimated his intention to contravene. The Court seemed agreed, that the additional rent here stipulated was not a penalty; but they were influenced by the expediency of preventing deterioration of the farm, and by the manifest intention of the landlord, as appearing from the terms of the lease, that the tenant should be bound to follow the prescribed course of management. The tenant was found to have no title to contravene. *Wortley M'Kenzie v. Gilchrist*, 13th December 1811. Fac. Coll.

The decisions in these cases are not, perhaps, reconcilable to strict principle. Had the landlords delayed bringing their complaints until the tenants had contravened the stipulations of the leases, the Court, in conformity to former decisions, would not have interposed to modify the additional rent to the actual damage sustained. If the additional rent be regarded as a penalty intended to guard against the commission of a wrong, like all

understood to have voluntarily subjected himself to the additional rent stipulated; nor is he entitled to demand relief from the obligation.

other penalties, it may be modified when it has been incurred. If, on the other hand, it be regarded as an additional rent, the stipulated price of a deviation, it is difficult to discover upon what principle the tenant is deprived of his alternative. According to these decisions it is a penalty when the landlord applies to prevent a contravention, but immediately after contravention it becomes an additional rent, however penal (as in Ewart's case) in its consequences. This departure from strict legal principle, seems to be founded upon the landlord's presumed intention to prevent deterioration of his property, by a condition which, whether it be denominated a penalty or an additional rent, was certainly intended as a security against a deviation from the prescribed course of management. It may be said, indeed, that there is an express obligation upon the tenant not to contravene; but surely when an additional rent is provided in case of contravention, the obligation becomes conditional, and the alternative qualifies the former obligation.

In framing a clause with reference to those decisions, it will be necessary, where an alternative is intended to be given to the tenant, to express that intention in the most unequivocal terms. Where it is meant to bind the tenant imperatively to follow the stipulated course of labouring and cropping, the clause should be so expressed, and a power reserved to the landlord to interpose when any deviation is attempted. The additional rent or penalty should be stipulated by way of greater security; and in fixing its amount it will be proper to take a sum sufficient to cover any possible profit which the tenant can derive from a deviation, even in the last years of the lease. The sum, however, ought not to be very exorbitant; for, notwithstanding the decisions referred to, the Court would certainly interpose to modify a sum, whether of penalty or of additional rent, were it altogether unreasonable and oppressive.

It might also be proper for the parties to provide for the failure of a crop, or for any other accident which may render a deviation highly expedient for the tenant, and by no means prejudicial to the landlord. It may be stipulated, that in such an event the landlord shall be bound to give his consent to a temporary change in the course of cropping. The want of the landlord's consent, were it unreasonably withheld, may be supplied by the authority of the Sheriff.

VII. OBLIGATION TO REMOVE.*

The obligation to remove has, in virtue of the act of sederunt 1756, attained its object, and has, in a great degree, superseded the actions of removing of the older law. We shall afterwards have occasion to see, in treating of the actions arising out of the lease, in what manner the tenant was anciently removed, as well as the effect produced by the act of sederunt. Nothing indeed can be more simple or efficacious, than the forms introduced by this act. The tenant obliges himself to remove at the expiration of the lease, without any warning. He receives, at least forty days

* *Form of the Obligation to Remove.*

" And the said B BINDS and OBLIGES himself, and his foresaids,
 " to FLIT and REMOVE from the lands and others hereby set, at the
 " expiration of this lease, without any warning or process of re-
 " moving for that effect."

Clause in the Act of Sederunt, 14th Dec. 1756.

" I mo, That where a tenant is bound by his tack to remove
 " without warning at the issue or determination of his tack, it
 " shall be lawful to the heritor, or other setter of the tack upon
 " such obligation, to obtain letters of horning, and thereupon to
 " charge the tenant with horning forty days preceding the term
 " of Whitsunday, in the year in which his tack is to determine,
 " or forty days preceding any other term of Whitsunday there-
 " after; and, upon production of such tack and horning duly
 " executed to the deputy-sheriff, or steward, or their substitutes,
 " of the shire or stewartry where the lands lie, they are hereby
 " authorised and required, within six days after the term of
 " removal appointed by the tack, to eject such tenant, and to de-
 " liver the possession void to the setter, or those having right
 " from him."

before the Whitsunday preceding the term of removal, a charge to perform this obligation; and should he fail, the Judge Ordinary is authorised to eject the tenant, and to give possession to the landlord or to a new tenant. The value of this form is infinitely enhanced, by comparing its effects with those which followed the tedious and uncertain forms of removing formerly in use.

But conveyancers, dissatisfied with a clause, which renders it necessary for the landlord to have recourse to legal proceedings, for recovering the possession of his farm, have endeavoured to effect the removal of the tenant by his own voluntary act, and by making his own interest operate as a security for the performance of his obligation to remove. With this view, an exorbitant rent, such as the tenant will not pay, has been stipulated for the year subsequent to the expiration of the lease; and, from the amount of the rent, the landlord trusts that the tenant will voluntarily remove at the stipulated term.

There are two forms in which the condition has been expressed—one by which the tenant obliges himself to remove in the ordinary style; and then, in case of his remaining, becomes bound to pay a very high rent.* Another (suggested by Lord

* The following is the form of this clause:—"And the said B BINDS and OBLIGES him, and his foreaids, to FLIT and REMOVE from the lands hereby set at the expiration of this lease, and to leave the same void and redd to the said A, and his foreaids, and their tenants, and that without any warning or process of removing: AND it is hereby PROVIDED and DECLARED, that if the said B, or his fore-

Kaims) in which the lease is made to endure for a year longer than the term actually intended by the parties; and for this last year, the rent is raised to a sum which, it is presumed, the tenant will never give; and an option of removing before the commencement of the last year, enables the tenant to free himself from the obligation.*

The difference between these two plans consists in this: That, by specifying a sum to be paid by the tenant, in case he shall remain in possession

said, shall continue to possess the lands hereby set, after the expiration of the foresaid period of years, THEN, and in THAT CASE, he and they shall be bound, as they are hereby bound, to pay to the said A, and his foresaids, the sum of £ sterling of yearly rent, for the year or years during which they shall continue to possess the said farm, after the expiration of the period foresaid, and that at the terms, under the penalty, and with interest, as above expressed."

* The clause may be thus expressed:—"THAT IS TO SAY, the said A, IN CONSIDERATION of the rents and other prestations herein contained, but under the conditions herein after-expressed, has SET, and, in tack and assedation, LETS to the said B, ALL and WHOLE, &c. and that for the space of TWENTY YEARS full and complete, from and after his entry thereto, which is hereby declared to have begun at ; and from thenceforth to be peaceably possessed by the said B, and his foresaids, during the whole space thereof, PROVIDING ALWAYS, and DECLARING, (notwithstanding the period for which this lease is to endure), that it shall be in the power of the said B, or his foresaids, at the expiration of NINETEEN YEARS from the said term of entry, to quit and renounce this lease; WHICH LEASE, &c. (*Clause of warrandice*): FOR WHICH CAUSES, and on the OTHER PART, the said B binds and obliges him, his heirs, executors, and successors whomsoever, to make payment to the said A, and his foresaids, in name of tack-duty, of the yearly rent of £100 sterling, for the first 19 years of this lease, and of the yearly rent of £300 for the remaining year of this lease, and that at two terms," &c.

longer than the period of the lease, which is the object of the former plan, this stipulated sum may be considered in the light of a penalty, and as such may be restricted to the actual damage; in other words, to a fair and adequate rent: Whereas, by the latter plan, the idea of a penalty is less consistent with the conditions of the lease: since the twentieth year is part of the endurance of the lease; and, of course, a year for which a rent has been provided by the constituent clauses of the lease. If this distinction be admitted; if, in the one case, the sum payable by the tenant shall be considered as a penalty, and in the other as a rent, still the former plan will have the effect of removing the tenant at the expiration of the 19 years, which the latter will not; for, by payment of the rent provided for the 20th year, the tenant has a title to remain in his farm, of which nothing can deprive him. Hence, in estimating the value to the landlord of those plans, it is obvious, that although the last may be less liable to evasion, yet it wants the powers of actual expulsion, which the other possesses; and that, in fact, were a landlord to enter into a new lease, and to become bound to give possession to a new tenant, he would find himself much more disadvantageously situated under a lease drawn up on the latter plan than on the former. Under the latter, the old tenant, on payment of the stipulated rent for the 20th year, would be entitled to remain in possession of the farm, leaving the landlord exposed to a claim of damage at the instance of the new tenant; while, by the other plan, if the old

tenant were not removed, he would at least be liable for the damage found due to the new one. But, in fact, the obligation to remove at the expiration of the lease, and in case of the tenant's remaining longer in possession, to pay a higher rent, has been sustained by the Court, as already mentioned, in two instances.*

Should the landlord be unable to give possession to the new tenant at the stipulated term, he will be exposed to an action of damages. Against such an action, however, the landlord may secure himself, by prevailing upon the new tenant to accept of an assignation to the old tenant's obligation to remove. By this arrangement, the matter will be left entirely to the old and new tenants,

* *Hart v. Anderson*, 1st February 1796. *Not reported*; and *M'Intosh v. M'Donnell*, 1st February 1796. *Fac. Coll. Mor. Appen. vocē Tack*, No. 5.—Here* the obligation was expressed in these terms:—The tenant obliged himself, “at the expiry of his tack, to fit and remove from the lands hereby set, without any warning or process of removing for that effect; where-in, if he fails, he shall be liable in double the said yearly rent for each year he continues thereafter.” The lease expired at Whitsunday 1795, and on the 14th February that year, a charge was given to the tenant, who was informed at the term that the farm had been set to a new tenant. The tenant, however, presented a bill of suspension on some informality in the charge, which being passed, the question came to be, for what rent the tenant was liable for the year after Whitsunday 1795. And the Lord Ordinary found, That “the obligation to pay a double rent for each year the tenant should continue after the expiry of the lease, is not a penal clause.” This judgment was brought under review, and a great majority of the Court were of opinion, “That the clause was legal and expedient, and ought, in every case, to be literally enforced. But it was at the same time observed, that if a case should occur where a rent altogether exorbitant was stipulated, the Court might modify it.”

the latter of whom may, if necessary, pursue a removing in the landlord's name.

VIII. MUTUAL OBLIGATIONS ON THE PARTIES TO FULFIL THE OBLIGATIONS IN THE TACK.

THE mutual obligation.^a—This clause is not to be understood as inferring an obligation, by which, however small the damage may be, arising from the non-performance of any of the stipulations, the party failing shall be liable for the full sum stipulated; on the contrary, the sum will be restricted to the damage actually sustained. Neither is it to be considered as coming in place of any of the obligations, so as to enable the party refusing to implement, to pay the penalty and be free. The words, “over and above performance,” are meant to guard against this consequence, and to bind the parties to the performance of the specific obligations, as well as to the payment of any damage which the neglect of them may occasion. Besides, from the nature of the obligations incumbent on the parties by entering into the lease, this consequence would follow, independently of any such expression.^b

^a “AND, LASTLY, both parties BIND and OBLIGE themselves, and their foresaids, to implement their respective parts of the premises to each other, under the penalty of £100 Sterling, to be paid by the party failing to the party observing, or willing to observe the same, and that over and above performance.”

^b Erskine, B. III. tit. iii. § 86. “Fixed penalties were, by the Romans, sometimes adjoined to obligations for the performance

This clause, then, creates no obligation which would not exist independently of it: and there is one thing which it may be proper to have in view here, that wherever a claim is made in a Court of law for implement of the lease, the expense incurred in making the claim effectual ought to be ascertained in the action, and a decree obtained for it, as it will not be competent for the successful party to claim the expense of his action under this general clause.*

"of facts, which seemed to be designed chiefly to remove the inconvenience arising, in most cases, from the uncertainty of the creditor's damage, by substituting a precise penal sum, which was understood to come in place of it, § 7. Inst. De Verb. Obl. By our customs, also, such penalties are not unfrequent; but they have no tendency to weaken the obligation itself, being adjected purely for quickening the performance of the debtor, who, therefore, cannot get free, by offering payment of the penalty though the words of style, '*by and attour performance*,' should be omitted. Beattie, 27th December, 1695. Fountainhall. Mor. p. 10039. Fac. Coll. Vol. I. 89. Broomfield, 11th August, 1753. Mor. p. 9446. Stair, B. I. tit. xvii. § 20."

* This would not be competent even in the case of a bond, *Gordon v. Maitland*, 27th November 1761. M. p. 10050. Here a decree of the Court being affirmed on appeal, the creditor claimed the penalty to the extent of his expense incurred in the appeal; but the Court restricted the demand to the expense of diligence, incurred posterior to the decree of the Court: And *Kilkerran*, (Penalty, No. 2, *Cupar v. Stewart, &c.*, 4th January 1740. M. p. 10044,) says, that although the Court, in a suspension, find the letters orderly proceeded for principal, interest, and penalty, yet the demand for the penalty can do no more than cover the necessary expenses of diligence.

IX. CLAUSE OF REGISTRATION.*

THE clause of registration contains a mandate by the parties to a procurator, empowering him to appear before a competent judge in their name, and there to consent to the pronouncing of a decree, in terms of the obligations contained in the lease.

The origin of this form is very ancient. There are to be found amongst the forms of the Roman law decrees of registration, where the mandate to a procurator, his appearance before the keepers of the record, his request to have the deed recorded, and the compliance with that request by the magistrate, bear a very close resemblance to the modern decree of registration. In the proceedings of the church courts, again, we find a device used, the advantages of which have been engrafted on the old form of registration; this device was well calculated to aid the views of the churchmen, in their attempt to bring the civil business of the country under their own jurisdiction: It consisted of a consent by the parties to the deed, to submit their persons and estates to the jurisdiction of the Ecclesiastical Judge; and,

* *Clause of Registration.*

AND BOTH PARTIES CONSENT to the REGISTRATION hereof in the books of Council and Session, or other Judges' books competent, that letters of homing, on six days' charge, and all other execution necessary, may follow on a decree to be interponed hereto, in common form; and, for that purpose, they CONSTITUTE their procurators, &c.

in some cases a decree was pronounced, (for their deeds were public, and executed in presence of the judge,) by which the party was ordered, under pain of excommunication, to make payment of the debt against the time specified in the deed; and, a contempt of this decree would have subjected the debtor to all the penalties which, in those times, followed the sentence of excommunication.

From those sources we have derived the clause of registration: at no very remote period it continued to preserve evidence of its origin, and the procedure on it proved it to be a decree of the Court, in which the registration took place; though now, so totally has every vestige of this disappeared, that the deed is delivered to the keeper of the record, amongst with others which are to be recorded for preservation merely, without the slightest difference in the form, and the extract is returned, signed by the clerk.

A plan of this kind would have appeared too bold in speculation; yet, by a regular gradation, and in the progress of time, it has been brought to a fortunate issue, and forms at present a peculiar excellency in our judicial proceedings. " Thus, (to use the words of Dirleton,) without
" action or process, we come to the extremity
" and conclusion of the process, to wit, sentence
" and all kind of execution; for, by a fiction, all
" that is necessary to a process is contained in
" the deed. In place of citation, (which would
" be idle, where the parties are present and con-

and designation of the writer; the day and place of subscription; and the names and designations of the witnesses to the subscriptions of the parties.—Upon the accuracy of this clause, and the regularity of the subscriptions and execution, the validity of the deed depends—and since the lease may occasionally be executed by those who are not perfectly conversant with the form of executing deeds, I shall add a few observations and directions on this subject.

day of one thousand eight hundred and years,
in presence of the said L M, and N, servant to the said A; AND
by the said B, at the day of and year foresaid,
in presence of O, farmer at , and P, servant to the said
B, the place and date of subscription, of the said B, with the
names and designations of the witnesses thereto, being inserted by
the said O.

L M, Witness.

A.

N, Witness.

B.

O, Witness.

P, Witness.

Where any part of the deed has been deleted, (although this ought always, if possible, to be avoided), the fact will be stated at the end of the clause, in this way, for example—"the twentieth and twenty-first lines, and five words in the twenty-second line, from the top of the first page, being deleted before signing;" and where there is a marginal note, there will be added to the first of the above examples, "witnesses also to the subscription of the marginal note on the first page, which marginal note was written by the said L M;" or should it occur in the other example, it will be expressed, "IN WITNESS WHEREOF, these presents, consisting of this and the preceding pages, written by L M, writer in , on paper duly stamped, are, with the marginal note on the first page hereof, also written by the said L M, and a duplicate hereof of SUBSCRIBED," &c.

216 PARTS OF WHICH THE CLAUSE CONSISTS.

This clause consists of the following parts:—

1. The attestation that the deed has been subscribed.
2. The name and designation of the writer.*
3. The number of pages of which the deed consists.
4. The date including the time and place.
5. The names and designations of the witnesses.
6. The attestation of marginal notes, their subscription, by whom they were written, and the erasures or parts of the deed which may have been expunged, before it was subscribed.

Of these, part are required by statute, and part by custom only; the 2d, 3d, and 5th heads are statutory requisites, the 1st and 4th are not, and the last may be considered, as, in some degree, partaking of the nature of the former class. The statutory requisites are, of course, indispensable, and any defect in them will be fatal to the deed; whereas, the others will not be so strictly judged of, and the neglect of them may, or may not, according to circumstances, be destructive of the deed.

The testing clause being written, (at least such is the regular method), the parties subscribe the deed; noblemen subscribe by their title; other

* It is not necessary that the whole of the deed should be written by the same person; but where more than one have been employed in writing it, the full name and designation of each writer should be inserted, and the portion written by each should be particularly specified.

persons by their christian and surnames, in their usual manner; the initial letter of the christian name with the surname in full is sufficient: This is done towards the right hand, as in the example in the foot note, and on the opposite side, the witnesses, in like manner, put down their names and surnames, each adding the word "*witness*" to his subscription.

The testing clause ought to be completed before the parties subscribe, but this is not always the case, nor do our forms absolutely require this regularity; on the contrary, it is very common (though not always a very safe practice) to leave a space for filling up the testing clause, above the subscriptions of the parties; and this clause may be filled up at any time after the parties have subscribed, provided only that it be done before the deed is founded on in Court, or put on record; for when either of those steps are regularly taken, the state of the deed is fixed, and a defect in the filling up of this clause cannot thereafter be remedied.

With regard to the instrumentary witnesses, that is, the witnesses called to attest the execution of the deed, they must be of the male sex, above 14 years of age, they ought to know the parties, and they ought to see them subscribe, or to hear them acknowledge their subscriptions; and, in this last case, the witnesses ought instantly, and in presence of the parties, to add their subscriptions as witnesses. This rule is founded on the

statute, and is unnecessary where the witnesses have seen the parties subscribe; for then two witnesses may see all the parties, however numerous, subscribe a deed, even on different days, and at last by one subscription, as witnesses, attest the various subscriptions which they have witnessed.

Subscription by initials is admitted, as binding, in the case of a party to the deed, when it can be proved that it was his practice to subscribe in that way; and that, in fact, he did so subscribe the deed in question: But in general, it will be found much more prudent to resort to the act of notarial subscription, rather than to trust to initial subscription, even of the lease; though, no doubt, with regard to that deed, the acts of corroboration are necessarily so numerous, that it would be less dangerous in it, than in other deeds. But it will be observed that, in all events, this mode of subscribing is inadmissible in the case of a witness, though it may be an act of necessity in the party. A party cannot be allowed to subscribe by a mark, or by having his hand led, or by tracing the letters of his name, written by another; in place of such devices, notarial subscription must be resorted to.

The lease, being correctly executed in those particulars, becomes a legal deed, binding upon the parties: In this respect our practice differs from the English. The English deed is not of itself evidence, it requires to be supported by the instrumentary witnesses; without this, it is good for nothing, unless by the

lapse of time: Whereas, with us, a deed regularly attested is, from the instant of its execution, a legal deed, and of itself evidence, subject only to reduction, on such grounds as the wisdom of our law has prescribed for the security of parties.

CHAP. IV.

IV. OF THE VERBAL LEASE. THE OBLIGATION TO GRANT A LEASE. OF THE INFORMAL LEASE; AND THE CIRCUMSTANCES WHICH MAY RENDER AN INFORMAL LEASE BINDING.

HAVING, in the preceding chapters, endeavoured to explain the requisites of the formal written lease, we have, in the next place, to consider leases defective in point of form, and to inquire how far such leases are binding, and under what circumstances they will receive effect.

It is a general and settled rule of the law of Scotland, that all obligations, relative to heritage, are ineffectual, if they are merely verbal. The rule is founded on this circumstance, that, in the transmission of heritable property, it is necessary, not only that every condition should be accurately fix-

ed, but, that the parties should have finally and irrevocably settled their agreement; and a formal writing is held to be the best test of both. It is accordingly a rule, that writing is essential as a solemnity, as well as necessary in point of accuracy, with respect to the nature and conditions of the transaction: till a written deed, therefore, has perfected and closed the agreement, either party is entitled to resile, as from a bargain on which he has not finally resolved.

Taking this as a general rule of the law of Scotland in regard to heritable rights, we proceed to inquire how far it has been applied to the lease. On this point there is a series of decisions, not only refusing to sustain a verbal tack for more than a year, but denying effect to a verbal tack of any longer endurance, even where possession has followed, and where the tenant has incurred expense on the faith of the agreement.* And although a reference to the oath of the landlord or tenant, for ascertaining the terms of the agreement, might be thought to be a sufficient ground on which to support a verbal lease, yet such reference has been rejected by the Court. In one case, a verbal agreement had been entered into for a lease of five years, and the tenant had entered and possessed for two of the five years, and he then resiled. The landlord offered to refer the circumstances to the oath of the tenant; but the Court were of opinion,

* Stewart v. Leith, 25th November 1766. Mor. p. 15178. A v. B, 26th June 1791; Dict. vol. iv. p. 322. Mor. p. 15181.

that even had the tenant admitted the circumstances on oath, still it was lawful for him to resile and quit the farm in any year before Whitsunday." In another case, the question occurred in somewhat of a different shape; for a tenant, having possessed under a lease, the landlord agreed that he should not be removed so long as he paid his rent; and having, in violation of this agreement, pursued a removing, the tenant maintained that he was entitled to remain under the landlord's agreement. The landlord supported his right to remove the tenant, on the want of writing; and maintained, that as writing was necessary to constitute a lease, it was equally necessary to the constitution of a proration of the lease; and the Court found, that the landlord was not bound to continue the tenant in possession.^b A decision to the same effect was pronounced, although possession had followed on the verbal lease, and the landlord offered to refer the terms to the oath of the tenant, yet the Court found that there was still *locus pœnitentiæ*,^c and allowed the tenant to resile.^d

^a Keith v. Johnston, 16th July 1636. Durie. Mor. p. 8400;

^b Lord Braco v. Sir Henry Innes, 15th January 1742. Home, No. 187. Mor. p. 15176.

^c In this chapter there are some phrases borrowed from the civil law, which are constantly recurring, and which, for the sake of unprofessional readers, it may be proper to explain. "*Locus pœnitentiæ*," is a power of resiling or drawing back from a bargain; "*rei interventus*," is the occurrence of some circumstance which deprives the parties of the power of resiling. "*Res non est integra*," is a phrase of the same import.

^d Buchanan v. Baird, &c. 15th Dec. 1773. Fac. Coll. Mor. p. 8478.

These cases sufficiently establish the rule, where the lease has been merely verbal; and here it may be proper to show what will be held to be a verbal lease. A tenant entered to the possession of lands without a written lease; and, after having possessed for some time, the proprietor took a judicial rental of his estate; and, amongst others, this tenant swore that he possessed his farm on a 19 years' lease, at a certain rent. The rent was specified, and this oath was signed by the tenant, and kept by the landlord. After the death of the proprietor, a removing was brought by the factor for his heir, against this ten-

Buchanan was proprietor of a shop in Glasgow, which he set to Baird and others for five years. The tenants entered into possession, possessed for two years, and then they gave it up. The landlord brought an action for implement, and maintained that the *locus pœnitentiæ* contended for by the tenants, was, in the circumstances of the case, a most ungracious plea. Verbal bargains, he admitted, might be misheard, misanswered, or not accurately remembered by witnesses, and that hence, in bargains relative to heritage, parole proof is disregarded. But, where the bargain is acknowledged, or proved by the oath of party, there is no reason, justice, or expedience, why it should not receive effect. In answer to this it was said, that laws must be fixed on general principles, and not on specialties. The general rule is, that in all bargains relative to heritage, writing is required; nor can it alter the case that the circumstances of the agreement can be proved by oath. Where missives are interchanged, though there can be no doubt of the terms of the agreement, yet if they be informal, the parties may resile. The Court found the *locus pœnitentiæ* still competent, and, therefore, that the tenants were not bound to fulfil the five years verbal lease founded on. In a verbal tack for 19 years the landlord was, on the same principle, found entitled to bring a removing at the end of the 13th year. *Graham v. Crawford*, 11th December 1802.—*Not reported.*

ant, who defended himself on the ground, That the form of the writing, by which a lease is constituted, is no where defined; and here the landlord held that the terms of the tenant's lease in writing, confirmed by his oath, and joined to the possession which had followed, ought to protect him from the action of removing. The answer was, that the oath refers to a verbal lease, and ascertains the terms of it; but that oath being taken down in writing, can neither invert the nature of the agreement, nor create a stronger obligation than the verbal agreement itself imported. The Court at first supported the lease; but, on re-considering the matter, they decerned in the removing, holding this written oath, signed by the tenant, and delivered to the landlord, as nothing more than the evidence of a verbal lease.*

The *first* conclusion upon this point, then, is that the verbal lease cannot be supported by the oath of the party, nor will possession give it any greater effect.

The next question is, whether an expense incurred by either party, on the faith of the agreement, will deprive the parties of the power of re-siling.

In a case decided long ago, the parties had entered into a verbal agreement for a lease of lands; and, in contemplation of that agreement, the landlord built barns, byres, &c. The Court held, that

* *Stewart v. Leith*, 25th November 1766. Mor. p. 15178.

even this, did not bind the tenant to enter into possession, as the buildings would answer another tenant.^a In another case, the tenant had taken a verbal lease of a house, for nine years, and, on the faith of that agreement, he had altered partitions, and fitted up pews and seats for a meeting-house, yet he was obliged to remove; the Court being of opinion that, notwithstanding these operations, there was still *locus penitentie*;^b and, in *Buchanan against Baird*,^c although it was alleged that the tenants had prevented the landlord from setting his subjects to advantage, by insisting on his adherence to his bargain, yet this was not held to deprive the tenants of the *locus penitentie*.

^a Skeen, 15th July 1657. Durie. Mor. p. 8401.

^b *M'Kenzie and Wylie v. Trotter*, 18th November 1729. Mor. p. 8437.

^c *Supra*, p. 221. In a more recent case, the Court proceeded upon the same principle, where the tenant had possessed on the alleged verbal lease for some years, and when he had been at considerable expense in improvements. Parole evidence was refused, on the ground that an agreement for a lease of 19 years, or a promise to enter into such an agreement, could not be proved by witnesses. *Neil v. the Earl of Cassillis*, 22d Nov. 1810. Fac. Coll. In this case, Neil the tenant had possessed on a written lease. On the expiration of the old lease, he alleged that a verbal agreement had been entered into between him and the landlord, according to which he was to receive a 19 years' lease of 36 acres of his former farm, provided a good tenant was obtained for the remainder. Such a tenant was obtained, and received a regular written lease; but no writing followed with respect to Neil's 36 acres.—He, however, entered into possession; and, on the faith of the agreement, expended considerable sums. At the end of 3 years a removing was brought. In this action, the Sheriff ordained the landlord to confess or deny the agreement;—he denied—and the

But the Court, although they do not admit these circumstances to be sufficient for giving validity to a verbal lease, do not permit the parties to injure each other; and, wherever such a verbal agreement can be proved, full indemnity will be given to the party who has suffered by a departure from it. In the case of *Skene*,^a the tenant having agreed to enter to possession under a penalty, in case of failure, the Court, although they would not force him to implement the agreement, so far as to enter into the lease, yet found it relevant to prove the condition of the penalty by his oath. In *M'Kenzie's case*,^b the Court, on the same principle, reserved the consideration of the question as to the expenses, laid out on the faith of the verbal agreement, at the same time that they refused to give effect to the lease; and, in the case of *Buchanan v. Baird*, the Court, in consequence of the conduct of the tenants, although they would not bind them to implement the lease, found them liable in a year's rent.

On this second point, then, it would seem that even where *res non sunt integræ*, the Court will not give effect to the verbal lease. In all cases,

Sheriff decerned in the removing. A Bill of Suspension was refused; and, in a Reclaiming Petition, Neill offered the evidence of the tenant in the remainder of the farm. The Court unanimously refused the petition without answer.

^a *Supra*, p. 223.

^b *Supra*, p. 224.

however, they will afford relief to either of the parties who has suffered a loss by trusting to it.*

* It was long ago held, that the heirs of a tenant, who had paid a grassum at the commencement of a verbal lease for a term of years, were entitled to continue in possession until the expiration of the stipulated term. Maitland's M.S. 13th June 1553. Dict. vol. i. p. 564. Mor. p. 8410. The principle of this decision probably was, that a grassum is a *rei interventus*, which shows that the parties had in contemplation a lease of a longer endurance than one year. This seems to be a departure from the strict rule deducible from some of the decisions. But the Court has, by some recent decisions, sanctioned such a modification of the rule.

Very considerable improvements upon the subject of the lease are not considered as a sufficient *rei interventus*. But should the improvements be of such an extraordinary nature as could not possibly have been thought of with reference to a lease of one year only,—such as draining and fencing lands, erecting new buildings, &c. especially where those operations have been carried on with the landlord's knowledge or within his view, and where a mere reimbursement of outlay would be an inadequate return,—the Court has more than once, in cases which are not reported, allowed a proof, with the intention of supporting the verbal bargain, should such extraordinary meliorations be proved. On this principle it has been held, that a gardener, who had at a very great expense, on the faith of a verbal lease for 19 years, converted an arable field into a garden, in which he planted fruit trees and bushes, was entitled to continue his possession until the expiration of the 19 years. Campbell, 5th March 1813. *Not reported*. And in a more recent case it was held, as in the very old case above-mentioned, that a grassum and the building of a house, was such a *rei interventus* as could be referable to a lease for a term of years only, and therefore sufficient to support a verbal lease for 19 years. In that case it was expressly said by the Court, that ordinary improvements, in the mode of culture, for example, would not have been sufficient to sustain such a lease. *M'Rorie v. Gray and M'Whirter*, 18th Dec. 1810. *Fac. Coll.*

These judgments, however, it will be observed, have been pronounced in questions between the grantor or receiver and his heirs. Purchasers, whose rights are founded upon writing, cannot be affected by unwritten agreements, nor by any unusual verbal stipula-

2. As to a written obligation to grant a lease, all the writers on our law are clearly of opinion, that the written obligation and the lease itself are one and the same thing. *Pactum de assedatione facienda et ipsa assedatio æquiparantur.**

The written obligation to grant a tack is not only equivalent to a tack in all questions with the granter and his heirs, but, when followed by possession, it is effectual against singular successors.

tions between landlord and tenant. From the judgment in the case of *Neil v. the Earl of Cassillis*, lately referred to, it seems also to follow, that a verbal bargain must be proved by reference to the oath of the party, and not otherwise.

* Craig, Lib. ii. Deig. 10. § 10. "*Pactum de assedatione, vel rentali faciundo, ut antea dixi, nihil aliud est nisi assedatio. Hoc etiam, observandum, quod pacto assedationis a domino denunciante ante conficiendæ, non minus colonum tuebuntur, quàm si ipsæ assedationes jam factæ essent; nam qui promittit facturum, in ea conditione est, ac si jam fecisset, quoties per eum mora sit, quo minus assedatio sit confecta;*" and again, after stating the case of a promise to give an heritable right, and marking the distinction between that and the promise to give a lease, he adds, "*nam pactum de assedatione facienda, et ipsa assedatio parificantur, præcipue si possessio sequatur,*" Stair, B. II. tit. ix. § 6. "As in other personal rights, so in tacks, an obligation in writ to grant a tack, expressing the substantials of it, is equivalent, as Craig sayeth, that '*pactum de assedatione facienda et ipsa assedatio parificantur, præcipue, si possessio sequatur,*' which is unquestionable as to the setter and his heirs; and was also found against a singular successor, &c. March 20, 1629, L. of Finmouth." Mor. p. 16463.

Ersk. B. II. tit. vi. § 21. "A written minute of tack, or an obligation by the proprietor to grant one, hath equal force with a formal tack, for, upon that minute or obligation, an action lies against the granter and his heirs for fulfilling it."

This has been repeatedly found, and is quite settled.*

3. Next of a written lease, defective in the solemnities requisite to constitute a legal deed.— These solemnities are meant to guard against forgery, and have been devised by the Legislature with much skill and attention. But, besides the protection which those forms bestow, they are solemnities, the want of which cannot be otherwise supplied; and it has been well observed, that, although the oath of a party would, no doubt, supply every defect in the evidence afforded by the attestation of a written deed, yet, were it to be generally admitted as equivalent, the consequence would be, that honest men would be bound, and knaves, who were willing to swear to a falsehood, would be free. Besides, on the death of a party to a contract, his heir might be bound or free as he should find most for his interest; and in the case of co-obligants, on the death of one of them, the survivor might be made liable for the whole debt, without having recourse against the heir of the deceased. The support of a defective deed, therefore, by the oath of the party, must depend on the question, whether the forms required by statute are to be considered as means of preventing forgery.

* *Garrioch v. Forbes*, 8th February 1750. *Kilk. voce Tack*, No. 9. *Mor.* p. 15177. *Grant v. Richardson's Representatives*, 10th July 1788. *Fac. Coll. Mor.* p. 15180. See to the contrary, *Clerk v. Farquharson*, 1st June 1799. *Mor.* p. 15225, where the question was with a singular successor.

or as statutory solemnities, the want of which cannot be otherwise supplied.

This question has often been before the Court, and is now settled. Two of the more recent cases may be referred to; and in the note an abstract of the argument will be found, with ample references to the preceding authorities. A landlord became bound by a missive, not holograph, to enter into a tack, which should contain all the usual clauses; a counter missive, not holograph, was also signed by the tenant, and a draft of the lease was prepared. No possession had followed, when the parties differed as to the terms of the lease, and an action was brought by the landlord to compel implement of the agreement. The Court found that there was still *locus pœnitentiæ*.^a In another case, a lease was granted; but, before possession had followed on it, the landlord brought an action of reduction of it, on the ground that it was defective in the statutory solemnities, the name and designation of the writer having been omitted, although required under the act 1681. The Court reduced the lease.^b

^a Maitland v. Neilson, 29th July 1779. Dict. vol. iii. p. 395. Mor. p. 8459.

^b M'Farlane v. Grieve, 22d May 1790. Fac. Coll. Mor. 8459. In support of the deed, it was pleaded: The statute has enacted,—“That all such writs, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending on the writer, or the designation of the writer and witnesses.” But though the term nullity does in our statutory law sometimes denote an intrinsic nullity, yet generally nothing more is meant by that expression, than as affording a reason of reduction. If this were not

When, therefore, there has been no possession upon a lease, or upon a missive of lease, neither of the parties will be entitled to insist for implement,

the case, it would be *pars judicis* to advert to the objection, and no decree in absence, where it occurred, would be of any avail; whereas, such a decree would be effectual till suspended, and is also capable of being homologated. *Lockie*, 20th Nov. 1697. Mor. p. 17014. *Boswell v. Kinnenmont*, 7th March 1612. Mor. p. 17011. *Grier-son and Mackie v. Scott*, 23d November 1699. Fount. Mor. p. 17022. *Sinclair v. Sinclair*, 17th Feb. 1715. Mor. p. 17031.

This expression, then, used in reference to the formalities of the deed, denotes an exception which the party may voluntarily pass from, and be debarred from pleading; and there can be no stronger bar than the acknowledgment of subscription.

The great object of the statutory regulations on this point is to prevent forgery. As the seals used in the authentication of deeds, gave occasion to fraud, subscription was required by the act 1540, c. 107; for the same reason, the name and designation of the writer was required by the act 1593, c. 175; nor was the spirit of the act 1691 different. From the lubricity of parole evidence, it was excluded, but other means are not therefore excluded; and of all means for ascertaining the verity of deeds, the most complete and satisfactory is the acknowledgment of the party.

Holograph deeds are not *verbatim* excepted in any of the statutes; and if, from the small probability of falsehood, they are held by implication to be excepted, *a fortiori*, ought those deeds which are acknowledged to be true.

If the statutory requisites were intended as solemnities, this would be attained by the presence of the instrumentary witnesses. But as the presence of the writer is not necessary, the sole object of requiring his name and designation, must have been with a view to prevent forgery.

In each of the following cases, the grounds of this plea have been recognized. *Beattie v. Lambie*, 26th Dec. 1695. Fount. Mor. p. 17021. *Redpath v. Huntly*, 22d June 1611. Mor. p. 17011. *Weir v. Moffat*, 29th Nov. 1609. Mor. p. 17011. *Sheriff v. Henderson*, 8th July 1623. Mor. p. 17012. *Crawford v. Wight*, 16th Jan. 1739. Mor. p. 16979. *Crosbie v. Shiells*, 4th July 1739. Mor. p. 16842. *Campbell v. Lennox*, 18th Nov. 1739. Mor. p. 16979. *Campbell v. M'Lauchlan*, 5th June 1742. Mor. p. 17046 and 12286.

unless the writing founded upon be probative, that is, either holograph of the party, or formally executed before witnesses, who, along with the writer of the deed, must be named and designed, in

D. of Douglas v. Littlegill, 23d Nov. 1742. Mor. p. 17033. *Foggo v. Milligen*, 20th Dec. 1746. Mor. p. 16979. *Neil v. Andrew*, 8th June 1748. Mor. p. 16981. *Rutherford v. Feuars of Bowden*, 17th June 1748. Mor. p. 8443. *Henderson v. Murray*, 5th Dec. 1765. Mor. p. 16986. *Clark v. Ross*, 19th Jan. 1779. Mor. p. 16942. Bank. B. I. tit. xi. § 47. Ersk. B. III. tit. iii. § 47.

To this it was answered:—It is for the purpose of solemnity, as well as of proof, that formal writings are required. "Solemnity in writ is essential to the perfections of dispositions to heritable rights, and of tacks," *Stair*, B. I. tit. x. § 9. But a null or informal deed never can produce such solemnity.

A null writing cannot be rendered probative, even by the acknowledgment of the subscription. Wherever recourse is had to the oath of the party, it must be subject to every intrinsic quality, as force, fear, &c.; it is therefore the oath, and not the writing, that in such case is probative. Besides, informal deeds are by statute declared "to make no faith;" an enactment not to be repealed by the acknowledgment of the party. Were this not the case, then, wherever writing is required as a solemnity, as in the same, it might be superseded by the oath of party. But the nullity of a deed remains after the acknowledgment; and the reason why it is not *pars judicis* to refuse action on a null writing is this, that any writing, whether valid or null, implies a verbal contract, which, though the subject be land, is, while acquiesced in, a good ground of action; as the want of writing affords only *locus penitentiae*, but leaves the party at liberty to acquiesce, if so inclined.

With regard to the effect of homologation, it certainly does not render the deed perfect; on the contrary, it continues as void as before. But it is the act of homologation which, of itself, establishes the contract, being an expression of consent, *rebus et factis*, which will bind parties, where neither a verbal contract nor an informal deed could have produced any obligation.

The decisions of the Court are uniform with respect to the principle, that a deed, defective in solemnity, cannot be supported by acknowledgment of the subscription. Even prior to 1681, this was found; *Ranken v. Williamson*, 14th February 1683. *Durie*. Mor.

terms of the act 1681. A defect in the statutory requisites cannot be supplied by a reference to the

p. 16881. *Cassimbro v. Irvine*, 14th February 1634. *Durie. Spottiswood. Mor. p. 13233*. But the subsequent decisions to the same effect are of more importance. *Gordon v. M'Pherson*, January 1686. *Harc. Mor. p. 17021*. *Campbell v. Robertson*, Nov. 1698. *Fount. Mor. 16887*. *Kirkpatrick v. Ferguson*, 21st Nov. 1704. *Mor. p. 17022*. *Abercrombie v. Innes*, 18th July 1707. *Mor. p. 17022*. *Logie v. Ferguson*, 4th February 1710. *Mor. p. 17026*. *Short v. Hopekin*, 3d July 1711. *Mor. p. 17029*. *Gordon v. M'Intosh*, 22d Dec. 1710. *Mor. p. 16974*. *Campbell v. Campbell*, 4th Feb. 1725. *Mor. p. 16898*. *Strachan v. Farquharson*, 23d Feb. 1728. *Mor. p. 16978*. *Innes v. Com. of Supply*, 8th Feb. 1728. *Mor. p. 2079*. *Davidson v. Charteris. Kirk. p. 839. Mor. p. 16899*. *Liddle v. Dick*, 20th July 1744. *Mor. p. 5721*. *Ferguson v. M'Pherson*, 20th June 1758. *Mor. p. 16848*. *Young v. Ritchie*, 2d Feb. 1761. *Mor. p. 16047*. *M'Kenzie v. Lawson*, 16th Nov. 1764. *Mor. p. 8449*. *Ersk. p. 427*. *Russel v. Paisley*, 17th Dec. 1768. *Mor. p. 16904*. *Sheddan v. Spruel Crawford*, 6th July 1768. *Mor. p. 8456*. *Crichton and Dow v. Sym*, 21st July 1772. *Mor. p. 17047*. *Grierson v. King*, 4th July 1781. *Mor. p. 17054*. *Wallace v. Wallace*, 25th Nov. 1782. *Mor. p. 17056*. *Edmonston v. Lang*, 23d July 1786. *Mor. p. 17057*.

The Lord Ordinary pronounced this judgment: "In respect of the decisions of the Court, and on that account alone, finds the tack libelled void and null, and reduces," &c. A reclaiming petition was presented, when the Court appointed a hearing in presence.

"Several of the Judges thought that the statute, by debarring condescendences in particular, did not mean to preclude the more certain test of the verity of deeds, by acknowledgment or oath of party. The case of holograph writings, it was argued, shows this; as these, notwithstanding the statute, are valid without witnesses, their verity being otherwise ascertained, although not near so completely as by such acknowledgment.

"It was likewise observed, though the writing be *de essentia* of deeds respecting land property, yet no part of the contents of the testing clause comes under that description. It is not comprehended in the *verba solennia* of writings, which is evinced by this, that the name of the writer of that clause is not required to

oath of the party, or by any other species of evidence.*

The effect of possession, or of a *rei interventus*, upon an informal lease, will be immediately considered; but there is still another species of informality which may occur, to which it is proper to attend.

"be mentioned. Its sole purpose is, for authenticating deeds, by the naming and designing of the witnesses. It is therefore useless in those writings to authenticate which witnesses are not necessary, such as holograph deeds; and surely much more deeds of which the subscription is acknowledged." And if the want of this clause altogether would have been of no consequence, a partial want, or a defect in it, cannot be supposed of more significance. Besides, the deeds spoken of in the statute, as not suppliable by a condescence, were evidently those only in which the subscription of witnesses was required.

The Court, however, were unanimously of opinion, that in competitions of creditors effect ought never to be given to the acknowledgment of subscription, so as to effect any *jus quasitum* arising from the informality of deeds.

A majority conceived that no deeds whatever were probative but those executed with all formalities required by statute. Were the oath of party, it was observed, made to supply the want of the statutory requisites, the consequences would often be very unjust; not only in general, with respect to all bargains to which writing is essential, the knave would be free and the honest man bound. But in the case of mutual contracts, where one of the parties happened to die, his heir might either be liberated or hold the other party under the obligation at his pleasure; and in that of co-obligants, one of them surviving might be made liable for the whole debt, while his claim of relief against the other *correi* would by their death be cut off.

The Lords, therefore, adhered to the interlocutor of the Lord Ordinary, reducing the tack in question.

* See the case of *Murdoch v. Moir*, 18th June 1812. Fac. Coll. where, in a question with the granter's heirs, improvements made upon land, in contemplation of a lease, were held sufficient to give effect to an irregular missive, although no possession had followed upon it.

Where a lease is granted to two persons, one of whom only signs, and the other resiles; shall the person who has subscribed be bound, or may he also resile? In judging of this question, it will be necessary to inquire, whether the person who has subscribed be the person whose faith alone was followed; for, if that has been the case, the lease will be effectual: whereas, if the faith of the person whose subscription is wanting has been followed, the party subscribing will be allowed to retract.*

The same principle is recognised in a case which Kilkerran reports in these terms:—"In mutual contracts, entered into between one person on one side, and two on the other, the one signing is not bound, unless the two on

* An agreement was entered into, by which a lease of certain lands was to be granted to three tenants, who were to be bound jointly and severally for the rent. The terms being thus adjusted, one of the tenants went to take a farther view of the lands, and to make some inquiries; and, in the meanwhile, the other two tenants signed the lease, which had also been signed by the landlord.—But the result of the survey being unfavourable, the third tenant refused to sign the lease. In an action for implement at the instance of the landlord against the two persons who had signed the lease, they contended that there was *locus penitentiae*, since all the parties had not subscribed the contract. The landlord might have resiled because his contract was with three individuals, and two only had entered into it; and the same rule ought to apply to the tenants, the two who subscribed having in point of fact engaged in the contract, on the faith of having the assistance of the third who had retracted. It is obvious, indeed, that this was an incomplete contract—until all the contracting parties had entered into it, none of them could be bound by it; and so the Court held. *York Buildings Company v. Baillie and Thomson*, 23d July 1724. Mor. p. 8435.

“ the other side both also sign ; because the faith
 “ of both was followed, unless it may appear from
 “ circumstances, that the faith only of one of the
 “ two, and who signs, was followed. Thus, where
 “ a tack was set to a tenant and his son, while
 “ under age, the tack was found effectual to the
 “ father against the granter, though the son did
 “ not subscribe it, because the faith of the father
 “ only appeared to have been followed ; and the
 “ putting in the son’s name to have been rather a
 “ concession to the father, than a stipulation by
 “ the granter of the tack.”

These two cases contain the general rule and the exception : Where a party to a contract resiles before the contract is completed, the contract is binding on neither party : And the exception arising out of the last case is, that where two parties have entered into a contract, without following the faith of a third party whose name is added, but who is at the date of the contract legally incapable of giving consent, the contract will be obligatory without the subscription of that individual, who never was properly a contracting party.

4. Of a lease, defective in point of form, but followed by possession. We might, perhaps, be led to assimilate this case to that of a verbal lease followed by possession. The possession following on a verbal lease, we have already seen, gives it no additional force ; it may be resiled from, after as well as before possession. But in the written

* *Hamilton v. Smith*, 8th November 1738. *Kilk. voce Mutual Contract*. *Mor.* p. 9168.

lease the rule is different; possession supplies the defect, and renders the contract binding on both parties; where the terms of the lease have been reduced to writing, although there has been no deed executed, even that, attended with a *rei interventus*, has been found effectual. Questions of this description may arise either with the grantor or with a purchaser, and they shall be considered in their order.

1. *Where the question arises with the grantor or his heirs.*—A subset of certain lands, for five years, was executed by mutual missive letters between the parties, written by a third party. The sub-tenant entered into possession under the lease, and possessed for one year; the sub-setter then obtained a decree of removing against the sub-tenant, on which he was ejected. In a reduction of this decree, the sub-setter acknowledged his subscription to the missive letter, but pleaded, that the missive not being holograph, was not a proper writing for constituting a tack for a number of years. It was answered that whatever might be the case in a question with singular successors, the plea cannot avail one who acknowledges the contract and his subscription to the writing, especially after it has been followed by possession. The reasons of reduction were accordingly sustained, that is, the informal lease, followed by possession, was held to be binding on the grantor.*

* *Barron v. Duncan*, 6th March 1753. Fac. Coll. Mor. p. 1517v.

In another case there was produced, in support of the tenant's possession, a missive addressed to him, subscribed by the landlord, promising a lease for 19 years. This missive was not holograph, and it wanted the statutory solemnities. It could not, therefore, it was argued, bind the granter's heirs. But it was held that a written obligation to grant a lease, though defective, was, when followed by possession, effectual; and the missive was sustained by the Court.^a

These are cases where there was a written obligation, though defective; and the possession, or *rei interventus* which took place, deprived the parties of that *locus pœnitentiæ*, which would otherwise have been competent to them from the defective state of the deed. But the same has been held where there were no deeds to which the possession could be ascribed, or from which an obligation could be inferred, and where the terms merely of the lease had been set down in writing, accompanied with certain circumstances of homologation on the part of the landlord.

Thus a lease for 19 years was proposed to be given. The terms were made out by the landlord, and were entitled "Proposals for setting" certain lands named. The jotting had no date, was not signed by the landlord, but had been marked by his initials; it was signed by the tenant, and there

^a Grant v. Richardsons, 10th July 1788. Fac. Coll. Mor. p. 15180.

was an obligation in it to extend a formal lease. Possession followed on this agreement; the rent was paid by the tenant, and he led lime, &c. He also entered into a submission for settling the marches of the farm, to which submission the landlord was a consenter. Under those circumstances the question occurred, whether the landlord had *locus pœnitentiæ*: The Court found that he had not.*

In another case, the heir of the tenant produced, as his defence against a removing, the draft of a lease in the hand-writing of the landlord, commencing at Whitsunday 1793; he produced also two receipts for rent, bearing to be the "first half year's rent of the second tack, beginning at Whitsunday 1793." The other "for the second half year's rent of the new tack." The tenant farther averred, that his father had led stones for inclosures which had been made to a great extent, in terms of the new lease, and had limed and brought in ground at a considerable expense. It was said in answer, that the draft contained the terms on which the landlord was willing to have given a lease, but that no lease had ever been formally entered into. The Court gave great weight

* Drummond v. Scott, 9th August 1787. *Not reported.*

† The estate belonged to a woman and the lease was in the hand-writing of her husband; this was made a leading objection; but the Court were clear, that the husband of an heiress was entitled to set a lease, which would be effectual during his administration; and therefore this circumstance did not affect the case.

to the terms of the landlord's receipt, by which the new lease was recognised; and on the *rei interventus* that evidently had taken place. It was observed on the Bench, "The scroll, when taken along with the possession, receipts for the rent, and other circumstances, affords evidence of the understanding of parties that there was a finished transaction, and therefore is a good defence against removing." The Lords assoilzied from the action of removing.* A memorandum in the landlord's pocket-book, expressing the endurance of the lease, if followed by possession, will even be sufficient to constitute a lease. There are more

* *Grieve v. Pringle*, 15th June 1797. Fac. Coll. Mor. p. 5951. In a recent case, a missive of lease was granted by the landlord's factor for the term of 15 years; the rent and endurance were distinctly specified, and this missive was delivered to the tenants. It was not, however, signed by the tenants, and there was no counter missive. Possession followed for two years, in terms of the missive, when the tenants expressed a wish to remove. The case came before the Court in the shape of a declaratory action at the landlord's instance; and although the missive wanted the subscription of the tenants, so that there was no written obligation by the party who was to be bound, and although the tenants offered proof that the bargain was conditional, yet the Court sustained the missive as effectual against the tenants, on the ground that neither tenant nor landlord is entitled to keep a writing in his possession, which he may or may not render obligatory as he chooses, by adding or withholding his subscription; and as to the allegation that the bargain was conditional, it did not appear from the missive, and any other proof was held to be incompetent. *M'Pherson v. M'Pherson and Clark*, 12th May 1815. Fac. Coll. A writing, subscribed by the tenant only, would, in similar circumstances, be equally binding. *Gordon v. Hall*, 10th August 1787, *Not reported*; and *Countess of Moray v. Bain, &c. infra*, p. 244.

than one decision to this effect, although none of them are reported.

In a still more doubtful case, the only evidence of a written lease seems to have been, 1. A state of the rotation and method of cropping agreed on between the landlord and his tenants. This scheme of rotation was in the hand-writing of the landlord's factor, or land-steward, but it had no date, mentioned no names, and specified neither rent nor endurance; it was said, however, to be a copy of a principal paper in the landlord's hand. 2. An entry by the factor, in his books, that the "tacks were to have been two guineas, including the plans of each farm." 3. A receipt for rent in these terms: "Islabank, 11th Nov. 1796, Received from Frederick Duncan, £17 : 10s. sterling, in full of his rent, crop 1796. Received also £1 : 2 : 10¹/₄d., as his proportion of the expense of building the Manse of Lintrathan." 4. A letter written by the landlord, to the tenant in the mill, (part of the subjects,) declaring he would support him in an action brought against neighbouring tenants for not frequenting the mill. 5. An assignation by one of the tenants to his son, of his right for the remaining years of the lease, which it was asserted had been made with the knowledge of the landlord. Such was the evidence on which the tenants were continued in their possession.*

* *Ogilvy v. Ramsay, &c.* 24th Nov. 1802. *Not reported.*

Those decisions have been pronounced, where the conditions of the lease were expressed in writing. It is not perhaps easy to perceive the distinction between such cases as the three last mentioned, and the case where the lease has been verbal, but where the terms of it have been fully established by the oath of party, followed by a *rei interventus*. There is not more certainty in the one case than in the other; or, if there be a superiority in this respect, it seems to be, in favour of the verbal lease, as ascertained by oath; and the *rei interventus* shows as complete an intention of becoming bound by the verbal lease, as where a letting of the terms has been made out; yet the cases must not be confounded, since the distinction has been clearly made and acted upon by the Court. Thus a tenant had possessed a lease for 21 years, at a rent of £30; on the expiration of which, an agreement was entered into for a new lease of 19 years, at the rent of £36 sterling, but there was no writing. This agreement was disputed, and the landlord's factor who had entered into it was dead. The landlord expressly denied that any such agreement had ever been made with him--and the factor gave no power to the factor to set leases. But there was produced by the tenant, a discharge of rent by the factor, bearing to be "the additional rent, as *per* the new agreement made with Sir James Campbell, for 19 years from Whitsunday 1784." The Court were clear that the new agreement had taken place, and that the tenant had not continu-

ed to possess by tacit relocation; but they held the agreement to have been a verbal one, and therefore one that might be resiled from. It was expressly said, as if with a view to mark more clearly the line of distinction between this case and that of the informal written lease, that it ought to be universally understood, that a verbal agreement relative to heritage is binding only for a year: but where there is an informal writing by the landlord, there is a distinction; Where it remains in *nudis finibus*, (that is, where no possession has taken place, and nothing has been done in consequence of the agreement,) there is *locus pœnitentiæ*; but where such an agreement has been followed by possession, the possession is a sufficient *rei interventus*; and the landlord must execute the lease in due form. In this case, the Court ordained the tenant to remove, reserving entire to him his claim for the expense of the meliorations which he had made.*

On this point, therefore, there can be no doubt; and in a question with the granter, where the conditions of the lease have been expressed in writing, where possession has followed, or where there has been a *rei interventus*, the parties will be bound to give effect to the conditions, and to complete the lease.

2. *Where the question arises with a purchaser.*—The right of a purchaser stands on his feudal

* Sir James Campbell v. Robertson, 30th May 1797. *Not reported.*

title, and the lease, which is at common law a personal right, can affect him only in virtue of the act 1449. From the terms of this act, it is obvious that the lease, contemplated by the Legislature, was a written lease, followed by possession. This is confirmed, by the meaning which practice has given to this act, for it has invariably been understood to refer to a written lease. The nature of the purchaser's title requires such an interpretation of the statute, and it is an interpretation affording a certain rule, without which, it would be impossible to draw a line between the different degrees of informality and defect, which may present themselves. When the question first occurred, the Court seem to have been of opinion, that an informal lease, though followed by possession, could not stand in competition with the right of a singular successor; and it is perhaps to be regretted, that this opinion should have been changed, for one so likely to introduce uncertainty into the decisions on this point, as that which has been since adopted. This first decision was pronounced in an action of removing, at the instance of the Countess of Moray, against certain tenants on the estate. It was the case of a widow, claiming under her locality; but a widow, in such circumstances, is equally entitled with a purchaser to remove from her locality lands every illegal possessor. The Earl of Moray entered into certain leases. The leases were made out, and properly signed by the tenants, but they had never been subscribed by the Earl. On these leases possession followed; and, on the death of

the Earl, the Countess Dowager pursued a removing, founding on her own title, and the informal nature of the lease. The Court of Session found the leases ineffectual in a question with the Countess, and ordained the tenants to remove. But this judgment was altered in the House of Lords, and the leases were sustained.*

To this judgment of the House of Lords, we are to attribute several judgments of a similar import, which have since been pronounced.^b And

* Countess Dowager of Moray v. Bain, Stewart, and others, 23d July 1772. Fac. Coll. Mor. p. 4392 and 15179. The judgment of the House of Lords declares, "That under all the circumstances of this case, the lease in question is as effectual and binding as if it had been signed by James the late Earl of Moray." *Appeal Cases*, p. 112. Mor. Supplement.

^b Skene v. Spankie, 20th May 1790. The farm possessed by Spankie was formerly the property of the Duke of Athole; and the tenant, on the death of her husband, received a permission to remain in possession, by a note in the following terms: "Dunkeld, November 1, 1783,—Mrs. Spankie may depend upon remaining in the palace of Falkland, and possessing the farm and grounds Mr. Spankie held at the time of his death, at the rent he then paid, as long as she pleases. (Signed) ATHOLE." This farm was sold by the Duke, and an action was brought by the purchaser for removing the tenant. But the Court held the writing to constitute a liferent lease, and not only assuaged from the removing, but found the tenant entitled to expenses. A similar decision was pronounced, *Drummond v. Gow*, 8th February 1797; *Not Reported*; where an offer for a lease was drawn out in the hand-writing of the heritor's factor, and signed by the tenant. The tenant was at the time in possession of the farm, and it was not very clearly shown, that possession had followed on the offer. This also was held to be an effectual lease against a purchaser. The same rule will apply to the lease of a Burgage Subject, *MacArthur v. Simpson*, 6th July 1804. Mor. p. 15181. In this case, the landlord addressed a letter to the tenant, by which he bound himself, his heirs and success-

it is the uncertainty to which such decisions necessarily lead, which has led me to regret that the decision of the Court of Session, in the case of the Countess of Moray, had not been supported in the House of Lords. But it will not be understood, after the decisions which have been so lately and repeatedly pronounced, that there can be any doubt on the point, so long as the law remains unaltered. It is a rule, therefore, founded on the present practice, that an informal lease, followed by possession, will be effectual against a purchaser, or other singular successor.*

In closing this subject, it may be proper to recapitulate the conclusions to which we have come on the different points.

1. A verbal lease may be resiled from by either party at any time, whether before or after possession, with this difference, that after possession

ors, to entertain him and his wife as tenants and possessors of a room and closet in his house in Inverness, as therein described, during all the days of their lives, for the yearly rent of £2 : 5s.—it being optional to the tenant and his wife, to give up their possession at any time; and possession having followed on this missive, it was found to be effectual against a singular successor, who had purchased the subject from the granter of the lease.

* It seems necessary, however, that these informal writings should express a finished agreement, and that they should be explicit as to the subject let, the endurance of the lease, and the rent to be paid, as even a *rei interventus* may be insufficient to supply defects in these essentials of a tack. In a late case, a missive, in which the term of endurance was not specified, was found not to be binding for more than one year, although possession had followed upon the missive for several years, and although the term of endurance was offered to be proved otherwise. *Clark v. Lamont*, 27th Jan. 1816. Fac. Coll.

has followed, it must be given up at the expiration of the current year.

2. A verbal lease cannot be rendered effectual by a reference to the oath of party, nor by possession having followed on it, nor by a *rei interventus*; but where there has been a *rei interventus*, damages may be claimed by the party who has suffered from the breach of the agreement.

3. A written obligation to grant a lease is equivalent to a formal lease, and either party may insist for implement; and, where it has been followed by possession, it will be effectual against a purchaser.

4. An informal lease, defective in the statutory solemnities, on which no possession has followed, may be resiled from by either party.

Hence a lease agreed to be executed by several persons may be resiled from, until the whole parties have subscribed it; unless the person whose subscription is wanting be a person whose faith was not followed.

5. An informal lease, defective in the statutory solemnities, on which possession has followed, will be effectual in all questions with the granter and his heirs.

6. A lease of this description will also be sustained, even against a singular successor, and in burgage subjects as well as in land.

CHAP. V.

RIGHTS ARISING TO THE PARTIES FROM THE CONTRACT OF LEASE.

HAVING, in the preceding chapters, fully considered the requisites, and the terms of the written lease, we are now to inquire into the nature of the rights enjoyed by the parties to this contract. In this inquiry, we shall attend,—1. To the conditions which affect the parties by law, independently of all stipulations. 2. To the rights retained by the landlord. 3. To the rights acquired by the tenant. And lastly, To the question, Whether the written lease is to be considered as a real or as a personal contract.

SECT. I.

CONDITIONS AFFECTING THE PARTIES TO THE LEASE, INDEPENDENTLY OF ALL REGULATION.

THE conditions affecting the parties to the lease, which are the subject of our present inquiry, are those resulting from the contract, independently of special agreement. A proprietor, for example, sets his land to a tenant, and the only conditions stipulated are the period of endurance, and the

amount of the rent; and the question is, What are the legal and implied obligations upon the parties, arising out of the connexion thus constituted between them? These obligations, which belong to the nature of the contract, shall be considered. 1. As they affect the landlord. 2. As they affect the tenant.

1. *Obligations affecting the landlord.*—1. The first of the obligations which the landlord undertakes by entering into a lease, is that of giving to the tenant possession of the subject set. This is the necessary consequence of a contract, the object of which is to give the management of the farm to the tenant, and the landlord is exposed to an action at the instance of the tenant for the purpose of attaining possession; or, should the tenant be deprived of the possession, he may sue the landlord for damages.

How far the tenant can, in virtue of his lease, pursue a removing against those in possession of the farm, in the common case of a 19 years' lease, may be doubted; for, although there is an old case, in which the Court sustained an action of removing at the instance of the tenant, against those who had no right to the lands; yet in that case it was the opinion of some of the judges, "That such tacks were only obligations, whereby the setter might be compelled to enter the tacks-man in possession of the land; but were not real securities, of force to produce removing, being of the nature of personal securities. But most part were of another judgment, there being

“no tack nor right in the proposer’s person;” that is, in the person of the defender who was in possession. And, agreeably to the opinion of the minority, this power was denied to a tenant whose lease was for 19 years, though when it exceeds that period, or is given for a lifetime, the older authorities seem to support the privilege in the tenant. A lease having been granted for 19 years, and the granter of the lease standing attainted of high treason at the time of entry, and incapable of giving a precept for warning the former tenant; the new tenant issued a precept of warning in his own name, which brought out the question, whether the person in possession could be removed on this warrant. “The Lords found, that the tack being “for no more than 19 years, and the tacksman “not in possession, he had not a title to pursue a “removing.”^b

^a Gallowahills v. Mackerston, 12th March 1629. Mor. p. 18251.

^b Gentle v. Henry, 19th February 1747. Kilk. (*Removing No. VI.*) Mor. p. 13040. “It was on this occasion observed, (according to Lord Kilkerran,) that in no case was the Brocard more “applied, that ‘omnium que a majoribus statuta sunt, ratio “reddi nequit.’ One can see a reason, why no other tacksman “should have a title to remove, but one who is *in possessione fructuum recipiendorum*, as removing is the effect of a real right: “But why a tenant, who has a liferent tack, should have a title to “remove, when, by its being a liferent tack, it does not become a “real right; or why a tenant, not in possession, should have a “title to remove, when his tack is for 30 years, more than if it “were for three years, was said not to be easy understood. Mean- “time, as our lawyers had so laid it down, that where a tack is for “life, as Craig and Stair, or for more than 19 years, (for so the “Lords understood Stair, *loco citato*, as requiring more than 19

On this authority, a tenant, under a lease for 19 years, cannot, in virtue of his lease, pursue a removing, but must trust to his action against the landlord for attaining possession; while a tenant, under a liferent lease, or where the endurance is for 30 years, or where the lease gives a power of outputting and inputting tenants, may pursue a removing in his own name.

2. The landlord is also bound to deliver the houses to the tenant in a proper state of repair, and suitable for the purposes for which they are intended. The dwelling-house fit for the accommodation of the tenant and his family; the stable and byres fit for the reception of the cattle; and the barns for preserving the victual: it follows as a necessary consequence, that should the houses become ruinous during the currency of the lease, they must be rebuilt by the landlord.

3. The landlord is farther bound to pay the public burdens affecting the farm, with the exception of the school-master's salary, which, by the act 1696, c. 26, is laid equally on the landlord and tenant.

4. The teinds, also, are a burden on the landlord, who, in this view, is held to be the intromitter with the crop, in consequence of his drawing the rents.* It follows, that the stipend payable to

" years,) the tenant should have that power, the Lords were not willing to give judgment contrary to these opinions."

* Hepburn v. the Tenant of Fairniefat, 13th December 1627. Durie. Mor. p. 1779. " In a spulzie of teinds by Hepburn against

the minister is a burden, not on the tenant, but on the landlord.

These are the burdens to which the landlord is subject, independently of stipulation.

2. *Obligations affecting the tenant.*—1. The tenant must enter to the farm at the commencement of the lease, and stock and labour it in a proper manner. It is not enough for the tenant to say that he will pay the rent when it becomes due. He must stock and labour the farm, and give the landlord security from the state of it, that the rent will be regularly paid. The Court ordained the tenant "to occupy and labour the farm, and plenish it with goods and corn, that thereby the lands might be answerable for the rent."^a

As the tenant is bound to enter into possession

"the tenants, the Lords found an exception relevant to liberate them, founded upon payment made by them to their master." The same collector reports the case of Murray, 21st March 1628, Mor. p. 1789, where a similar decision was pronounced. The Lords sustained an exception as relevant, bearing payment to have been made by the tenants to their landlord. "Seeing they could not know what part of their rent they should keep unpaid from their master for the teind, different from the stock; for both which they were astricted in a duty undistinguished." Lord Kaims reports the case of Campbell v. Murray, June 1727, *first coll.* No. 86. Mor. p. 14792, where the point was argued, whether a landlord is liable for the stipend localled upon the lands, though he has set the lands separately from the teinds, and, of course, draws a rent for the stock only; the tenants being in use to draw the teinds, and pay the minister: but this was not finally decided. In this argument it was expressly admitted, that, in the common case, where the rent is for stock and teind, it is against the landlord alone any demand can be made.

^a Randelford v. his Tenants, February 1623. Mor. p. 15256.

and labour his farm, so he must continue to possess and labour it during the currency of the lease in a proper manner, and not so as to exhaust and run out the soil.^a

The tenant is bound at common law to labour the farm, during the whole currency of the lease, in such a manner as not to exhaust the soil. A special condition is not required in order to enforce this obligation; and the tenant will not be permitted to depart from this equitable plan of management towards the termination of the lease, so as to leave the farm in a worse condition than that in which he found it.^b It follows, from the

^a *Murray v. Balcanqual*, February 1685. Gilmaur, No. 144. Mor. p. 15257. The tenant was accused of having tilled the swaird of some parts, which had never before been laboured, and of over-liming the farm in such a manner as would infallibly, at the end of the lease, leave the farm quite exhausted. The tenant, in answer to this, said, that he was bound to no particular manner of cultivating the farm, and might therefore labour it in whatever manner appeared to him most for his advantage. But the landlord insisted that a tenant was bound to labour his farm, *tanquam bonus pater familias*, and not to destroy and run out the ground. The Court ordered an inquiry to be made as to the state of the farm, and the consequences to be apprehended from the tenant's mode of labouring.

^b *Lord Haddo v. Johnston*, 6th February 1693. Durie. Mor. p. 7539. In this case the tenant after being warned to remove, tilled the greens and swairds of the land not in use to be laboured, and burned the mosses of the farm. The landlord pursuing for the damages which these operations occasioned, the tenant defended himself on the ground, that such an action was a novelty, and on that account ought to be dismissed. Besides, being unrestrained and limited by no special condition, he was at liberty to labour every part of the farm, and he had laboured agreeably to the custom of the country. The Court sustained the action, and "found,

obligation upon the tenant to possess and labour, that he cannot abandon the farm, and leave the superintendence and management of it to others.*

The tenant must consume the straw of the farm on the ground, and lay upon the lands the whole dung made upon the farm. This is said to have been found in two unreported cases;^b and the question has since occurred, whether the tenant could dispose of the fodder growing upon the farm during the currency of the lease.

The tenant in this case proposed to reserve as much of the crop as might be sufficient for supporting the horses on the farm, and to sell the remainder. The Sheriff authorised the sale. But the Court, in an advocation, found, "That though
" there was no express clause in the contract of
" lease, which ties down the tenant from carrying
" off, or otherwise disposing of the whole fodder

" that no tenant, albeit no such condition had been specially made,
" might, by his labouring, rive out the old swairds of ground, nor
" yet burn the mosses, but that the rooth (farm) should be left by
" the tenant as good when he removed therefrom, as the time of his
" entry thereto."

* Lord Dalhousie v. Wilson, 1st December 1802. Fac. Coll. Mor. p. 15311. In this case the tenant appointed a person skilled in agriculture to manage the farm, principally for behoof of his creditors. He himself left the kingdom; and although the landlord was offered undoubted security for the proper management of the farm, and the regular payment of the rent, the Court held that the landlord was entitled to resume possession, the tenant having left the kingdom, and thereby withdrawn himself from the jurisdiction of the courts of this country, so that the landlord was left without a tenant. See this case referred to, *Supra*, p. 158.

^b M'Murray v. Maxwell, 1776. *Not reported.* The Duke of Roxburgh v. Archibald, 1785. *Not reported.*

“ or straw, that may be produced on the farm of Fairnilee; yet, that he is not at liberty so to do, in opposition to the will of the landlord; as, “ were such conduct to be tolerated, it would be attended with ruinous consequences to the ground, “ as well as repugnant to the general mode of cultivation in the country; and therefore, prohibited and discharged the defender, from selling off in future, either by public roup or private bargain, the fodder on said farm of Fairnilee, “ and ordered him to consume the same thereon, “ during the remainder of the lease.” On advising a reclaiming petition, it was observed on the Bench, “ That a tenant cannot sell fodder off “ his lands, unless he either bargain with the purchaser for the dung produced from it, or purchase as much for the use of his farm.”^a According to this decision, therefore, the tenant, even where the lease is totally silent on the point, must consume the fodder on the farm, or purchase dung equivalent to the fodder he may sell.

This decision has been confirmed by the judgment in a case, the circumstances of which prove the resolution of the Court not to relax the strictness of the rule. The lease was to endure for no less than 57 years, and the tenant possessed an express power of assigning or subsetting. He subset part of the farm for a short period, and the sub-tenant on leaving his possession, proposed, according to what he conceived to be the right of an outgoing tenant, to dispose of his

^a Pringle v. MacMurdo, 30th June 1796. Mor. p. 6575.

crop; but the landlord opposed the sale, and the Court held that he had a title to do so.^a

By these decisions, the necessity of consuming the fodder on the ground, during the currency of the lease, seems to be fixed. But still a question remains as to the fodder of the last crop, and the dung which may be made after the last seed time.

The Court found, that an outgoing tenant was entitled to dispose of his straw.^b In the case of

^a The Earl of Northesk v. Roland, 2d February 1797. Mor. p. 15254. "Observed on the Bench, the original lessee could not have carried off the fodder of the crop in question, and his assignee or sub-tenant can have no higher right. Were the doctrine of the tenant well founded, the fodder might be constantly carried off by means of annual sub-leases." It was on this reasoning, the Court prohibited the tenant and his sub-tenant, from carrying off any part of the fodder from the farm.

This point has been deliberately considered in a late case, in which, after very full pleadings and considerable difference of opinion, the Court found, that a tenant who had two farms in the immediate vicinity of each other, belonging to different proprietors, was not entitled to consume the turnips or green crop, or the fodder of the one farm upon the other, although he offered to furnish an equivalent in dung for the crop so consumed. Neither was he entitled to carry his grain from the one farm, on which there was no threshing mill, to be threshed on the other, on which a threshing mill had been erected, although he offered caution to return the fodder to the farm on which it grew. This seems a hard case for the tenant; but the majority of the Court were of opinion, that to admit any relaxation in the strictness of the rule would be a bad precedent, and might occasion unnecessary trouble to the landlord. In this case the lease contained no stipulation whatever upon the subject; so that the rule is founded entirely upon the nature of the contract of lease, and, independent of the agreement of parties, forms one of the implied obligations upon the tenant. *Scott v. Durham*, 27th May 1813. Fac. Coll. See the report, which is very full.

^b *Jamieson v. Pringle*, 16th May 1792. Not reported, but noted. Dict. vol. iv. p. 329; and Mor. p. 15263.

Fringle v. M'Murdo,^a the tenant was permitted "to sell his hay and the straw of his outgoing crop;" and in a later case, the Court found the tenant entitled to the value of the straw on hand.^b This point, therefore, seems also to be fixed; and an outgoing tenant, where there is no special stipulation, may dispose of that part of the fodder of the last crop, which is on hand at the expiration of the lease. Whether, if it could be shown, that there was any change in the stock of cattle on the farm, during the last year, the Court might not be induced to make some exception to this rule, it is unnecessary to inquire; it is sufficient that the general rule is understood, viz. that the fodder of the last crop may be disposed of.

The next point to be considered, relates to the dung on hand at the expiration of the lease. The general rule is, that the dung made on the farm must be laid upon the lands by the tenant: but admitting this as the rule, still there must be a quantity of dung made between the sowing of the last crop, and the terms of the tenant's removal, which cannot be laid upon the farm.

It often happens, that the lease provides for the disposal of this dung, and declares it either to be steelbow, that is the property of the landlord, in consequence of the tenant's having received at his entry the dung of the outgoing ten-

^a *Supra*, p. 254.

^b *Hamilton v. Clark*, 1791. *Not reported*.

ant; or it is declared to belong to the landlord, or incoming tenant, on payment of a price. The former stipulation was enforced in a case where the tenant "bound himself, during the currency of the lease, to consume on the ground of the lands, the whole straw and fodder of every kind (except hay,) and to lay the whole dung thereby produced on the said lands;" this clause was held to entitle the landlord to the whole dung on hand, at the expiration of the lease.* It is an objection to this stipulation, that by it all care to collect and preserve the dung is taken away: it is not the interest of the outgoing tenant to be careful of the manure, and unless it be so, it is not likely that he will pay much attention to it; a partial loss of this valuable article will therefore be the consequence of such a regulation.

On the other hand, where the outgoing tenant is entitled to receive payment for the dung on the farm, at the expiration of the lease, there is a danger that he may starve his fields to increase the quantity of dung, and so to enlarge his claim: This is not very probable, but still, where it is made matter of contract, there will, in general, be an attempt to guard against any undue accumulation, which may perhaps be best accomplished by a stipulation that the dung of each year shall be laid on the lands in the subsequent year; and

* *Earl of Wemyss v. Wright*, 16th June 1801. Mor. Appen. I. voce Tack, No. 7.

as to the dung of the last year, a price shall be paid for it."

But it is more important to consider what the rule is where the lease is silent on this subject. The rule at one time adopted by the Court is thus stated:—"A tenant removing from his farm at Michaelmas, left a quantity of dung on the land, collected from November of the year preceding; for the value of which he brought an action against the master and the incoming tenant: urged in defence, that the tenant ought to have laid that dung on his beer land; and that the outgoing tenant is bound to labour the land of his farm in the same manner the last year as any other. The Lords found the tenant only entitled to the value of the dung, made after the beer seed-time of that year." The principle of this decision is good, but the practice, as to the

* In the latest case which has occurred upon this point, the tenant was bound by his tack to consume the whole fodder on the land, "and to lay the whole dung thereon the last year of the tack, at bear seed-time."—At the last crop the tenant withheld part of the dung from the lands; and besides the dung so unduly withheld, he had a considerable quantity on hand made after the bear seed-time. The question occurred between the incoming and outgoing tenant; and the Court found the incoming tenant entitled, without payment, to the dung unduly withheld.—And with respect to the dung made after the bear seed-time, it was found that the incoming tenant had a preferable right to it on payment of its value. *Forrester v. Wright*, 19th February 1808. *Fac. Coll. Mor. Appen. voce Tack*, No. 16.

^b *Finnie v. Trotter*, 27th January, 1767. *Fac. Coll. Mor. p. 15261*.

mode of dunging having changed, perhaps the same principle, when applied to the new practice, may lead to a different decision.

In one case a decision was pronounced, which seems to support a different practice; yet it evidently was a decision, in so far as that point is concerned, founded on the application of the party entitled to call it in question, and, in fact, acquiesced in by that party; so that, considered as a precedent, it can have no weight; and the point, when it occurs, must be viewed by the Court as a new one, and decided according to what shall appear to be most consistent with the principle of the contract, and the interest of agriculture. In the case referred to, the tenants were expressly bound not to sell either straw or dung; and it was provided, "that the proprietor should be preferred to the purchase of the dung made on the farm, after "Whitsunday, in the last year of the lease." When the tenant removed, part of the dung on the farm had been made previous to the Whitsunday, and for the value of this part of the dung the tenant certainly had no claim; in terms of the agreement, it must have belonged to the landlord, the tenant being (by the clause in the lease) entitled to no more than the value of what had been made after the Whitsunday. Without attending to this, the landlord applied "for a valuation of "the *whole* dung on the farm." The Sheriff "found the tenants entitled to the value for one "crop only of what had been made previous "to the Whitsunday." The Lord Ordinary, when

the cause came before the Court, made the same distinction; and having found the tenant entitled to the full value of the dung, made after Whitsunday 1799, his Lordship "found they were entitled only to the value for one crop, for what was made previous to that time." These judgments of the Sheriff and Lord Ordinary were never reclaimed against by the landlord; so that it may be considered as a point decided, either with the consent of the landlord, or, at least, not pleaded in such a manner, as to have induced the Court to rectify the mistake; and from the manner in which the landlord conducted the process, it does not seem to have been thought necessary to consume the time of the Court in reconsidering the matter.*

With regard to this decision, as it was impossible for the Court, consistently with the clause in the lease, to have awarded any value for the dung made prior to Whitsunday 1799, unless from the terms of the application to the Sheriff, it is not to be looked upon as a decision, fixing the point, that dung made on a farm, at whatever period it may have been made, must be paid for by the landlord or incoming tenant, at the rate of one crop.

This rule of paying at the rate of one crop, and including all the dung at whatever time made, seems to be peculiar to the county of Haddington. One crop is estimated in that county, at 1s. 6d. *per* cubic yard of dung; how far that is more for

* *Hamilton v. Clerks, 1781. Not reported.*

the interest of the tenant, than giving him the full value of the dung, made after the last seed time, I cannot say; but, in laying down the general rule, the decision in the case of *Trotter v. Finnie*,* has certainly never yet been departed from by the decisions of the Court; and, whether it ought to be departed from, in consequence of the change in the practice of farmers, who now, it is said, do not apply dung with the beer seed, is a question which yet remains undecided.

2. Another obligation incumbent on the tenant, is the preservation of the houses on the farm; for, it has been found, "That, by the nature of the contract of location, tenants are obliged to leave the houses in as good a condition as they got them, and to uphold them during their stay, unless a contrary paction be proved."^b

3. A negative obligation incumbent on the tenant, as inconsistent with the nature of his possession, is that by which he is disqualified from keeping a change-house on his farm. The Court held, that the tenant was attempting to make such an use of the property let to him, as was not warranted by his tack, and such as in itself ought to be discouraged, and prohibited him from selling ale or spirituous liquors, on any part of the lands.^c

* *Supra*, p. 258.

^b *White v. Houston*, 20th December 1707. *Fount. Mor.* p. 15238. The tenant lies under the same obligation at common law, with regard to the fences, which he must leave in the same condition in which he found them. These, however, are points which are in general fixed by an express provision in the lease.

^c *Mila v. Mitchel*, 23d February 1787. *Mor.* p. 15254.

SECT. II.

THE RIGHTS RETAINED BY THE LANDLORD.

IN treating of the rights retained by the landlord, it must be recollected, that the right of property remains with him; and that it is the right of possession of the surface only that is given to the tenant: It is a possession, too, for the particular purpose of raising annual crops. From this several consequences follow, which have an important effect upon the interests of the parties.

1. From the right of property inherent in the landlord, the mines and minerals in the lands, not only remain his, but, that his right may neither be lost to himself nor to the public, even during the currency of the lease, he is at all times allowed to seek for, and work those minerals. This is a right enjoyed by the landlord independently of any stipulation.

The right to the metals, and more valuable minerals, cannot be disputed, but questions may be raised, where the mineral approaches nearer to the common soil: Does shell marle, for example, which is discovered in a farm while under lease, belong to the landlord, in virtue of his reserved rights, or, is it part of the soil, over which the tenant has a power of disposal? In one case, the landlord, on the discovery of the marle, wrought and disposed of it, until he was interrupted by the tenant, who maintained, that he had a right

to use the marle, as a manure for the farm—That it was in the power of a tenant, to mix the soils of which his farm consisted, in the manner which might insure him the best crops—That he might use a sandy soil to improve clay, or mix clay with lighter soil; and, from the same principle, he was entitled to use the marle for meliorating the other parts of the farm.—The landlord conceded to the tenant the right of mingling the soils in any manner he chose; but he made a distinction between shell marle and common soil, and contended, that a bed of shell marle was a substance as distinct from common soil, as coal or limestone; and, therefore, that it formed no part of what had been let to the tenant. “ Observed
 “ on the Bench; clay marle and shell marle are of
 “ a different nature; the latter is as much a separate substance from the soil, as a quarry of limestone; and the tenant has no right, in virtue of
 “ his lease, to take and use it, without a special
 “ power for that purpose. Whether he may take
 “ clay marle, or any part of the soil, and put it
 “ upon another without the landlord’s consent, it
 “ is not necessary to determine in the present
 “ question.” The Court “ Found, that the property of the marle belongs to the landlord, and
 “ that the tenant has no right or title to work,
 “ use, or dispose of the marle.”

* *Bethune v. Jervise*, 10th February 1778. Fac. Coll. Mor. 15267.

There is an inferior description of fossil, which gave rise to a question of the same kind; a tenant, having empowered a pipe maker to use the pipe-clay on his farm, and that grant coming in competition with a right of the same kind derived from the landlord, the Court found, that the person, holding the landlord's license, had an exclusive right to the clay; that the tenant had, by his tack, no right to it, and could give no license to any person to use it.*

It is thus sufficiently proved, that the metals and minerals under the surface, are, by an implied reservation, the property of the landlord; and the next question is, whether the landlord may seek for, and work these, during the currency of a lease, without having reserved to himself a power of doing so.

In opposition to the exercise of this power, which must materially affect the operations of the tenant, it may be urged, that the landlord, by giving out the surface to be cultivated and possessed by the tenant for a time specified, without any reservation, has deprived himself of the power of working mines, during the currency of the lease; that to decide otherwise, would be to enable the landlord to reclaim the possession of the surface, the use and enjoyment of which, he had guaranteed to the tenant; that this plea had no tendency to deprive the landlord of his right of pro-

* Colquhoun v. Watson, 15th February 1668. Stair. Mor. p. 15258.

perty in the metals and minerals, but merely to interrupt his use of them; a consequence which was the necessary result of the contract he had entered into with the tenant. This argument was very forcibly urged in the cases of *Bethune* and *Jervice*, and of *Colquhoun*.^a The landlord, it was said, was not at liberty, during the currency of the lease, to break the surface: but it is an argument which has constantly been disregarded; and the right of property in the landlord has been held to carry with it the right of searching for, and working the minerals.^b

Thus the landlord, without the necessity of expressing it in the lease, retains a right in the minerals, which entitles him to break ground in search of them, to work them when found, and to make roads through the farm, by which they may be carried off. But it must always be understood, and it was found in *Smith's* case, that when the landlord exercises those powers, he must pay to the tenant the surface damage which his operations may occasion.

2. The right conferred on the tenant, is that of

^a *Supra*, p. 263 and 264.

^b *Smith v. M'Gill*, 21st June 1768. Fac. Coll. Mor. 15266.
 " FOUND, that the heritor has right to search, and put down sinks
 " for coal, in lands set in tack, upon satisfying the tenant for the
 " damages which may be thereby incurred. The tenant admitted,
 " that the right to the minerals remained in the heritor, but con-
 " tended, that he was not entitled to break up the ground during
 " the currency of the lease, in respect there was no stipulation to
 " that purpose."

possessing the surface for the purpose of raising annual crops; and hence, independently of any exception, the planting and growing timber on the farm, which does not fall under the view of the contract, is the property of the landlord. "The right of the tenant (according to Erskine) is limited to those yearly fruits, which either naturally, or by the lessee's industry, spring up from the surface; he is therefore not entitled to any of the woods or growing timber."^a This was decided long ago. A tenant who held a lease for five times nineteen years, in which the lands were set to him, with "woods, glens, pasturage," &c. was found not to be entitled to sell or dispose of the wood, but only to use it for the purpose of repairing the houses on the farm, or for building new ones.^b

This rule is farther supported by the act 1698, c. 16,^c by which the tenant is bound, under a penalty,

^a Ersk. Inst. B. II. tit. vi. § 22.

^b Touch v. Ferguson, 16th June, 1664. Gilmour, No. 103. Mor. p. 15252.

It has lately been found that a tenant is not entitled to cut and sell saugh or willow trees, whether planted by himself or not; when they are of a large size and contain measurable timber. In arguing this case, it seems to have been admitted, that young willow trees, such as are used for making hoops, baskets, &c. may fairly be considered as a crop, which the tenant is entitled to cut and sell. Bogue v. Wright, 21st Nov. 1806. Mor. App. voce *Planting and Inclosing*, No. 2.

^c Act for preserving planting.

OUR SOVEREIGN LORD, with the advice and consent of the estates of Parliament, RATIFIES and APPROVES all former laws and Acts of Parliament, made for planting and inclosing of ground, and for making the same more effectual, STATUTES and ORDAINS, that all tenants and cottars shall preserve and secure all growing wood and planting that is upon the ground they possess, that none of it shall be cut, broke, or pulled up by the roots, or the bark peeled of any

to protect the planting on his farm, and to be answerable for the acts of his family and servants.

The expression used in the act, is "*growing wood and planting*;" and it has been doubted whether this includes what is called natural wood, growing from the roots of trees which have been cut down. In a case where there was a number of natural growing trees, which had been cut during the possession of a tenant, it was questioned whether they fell under the statute. It was proved that the glen in which the trees grew was in use to be pastured by cattle and sheep, and that the trees had not, at any former time, been preserved for sale; nor were they of such value as to be worth preserving. The Court, influenced probably by the small value of the trees, found, that such trees were not the "*growing wood*," which, by the act, the tenant is bound to preserve; and therefore assailed the tenant from the penalties of the act.*

But it must not be inferred from this decision, that natural wood is not protected by the statute. The contrary has been decided. In a case where some oak trees had been cut down by the tenant, and the landlord brought an action for the penal-

tree; and that under the pain, to be exacted by their masters alienably, of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree that is above the said age of ten years, unless the same be done by warrant and order of the said master and heritor of the ground; and ORDAINS the tenant to be liable for his wife, children, and servants, or any others within his family, that shall contravene the present act.

* *Fergusson of Auchinblain v. M'Nidder*, 24th July 1724. Dict. vol. ii. p. 87. Mor. p. 10479.

ties under the act; the Sheriff, "in respect it appears that the trees libelled were not planted trees, but grew in a natural wood from stools or roots of trees that have been formerly cut, ordains the pursuer to instruct the value of the trees libelled, at the time of their being cut by the defender; and what value they might have risen to, had they been allowed to grow to maturity." A bill of advocation of this judgment was refused by the Lord Ordinary on the bills. But the point having been brought before the Court by petition, the Judges seemed to consider the above-mentioned act of Parliament as not exclusively applicable to planted trees, but as relating likewise to natural wood; and accordingly they passed the bill of advocation.^a

It has also been found, that fruit trees in orchards fall under the act.^b

The object of the act, therefore, (as explained by decisions,) is to protect both planted and natural wood as well as orchards; but there is a question which still remains, in regard to the person committing the offence. The act, it will be observed, says in general, that the tenant or cottar shall be liable in certain penalties for each tree cut on the ground which is in his possession; and in the close of the act, there is a provision, that the tenant shall be answerable for his family and servants. Now, if he was truly answerable for the destruc-

^a Buchanan v. Malcolm, 3d March 1784. Mor. p. 10497.

^b Robertson v. Robertson, 21st July 1744. Kilkerran, p. 403. Mor. p. 10484.

tion of the trees, whoever was the offender, this last provision seems unnecessary; and accordingly it has been questioned, whether it be not necessary to prove the offence against the tenant, in order to render him liable.

When this question occurred, it was found to be the meaning of the act, that growing timber, cut or destroyed on a tenant's possession, is held to be cut and destroyed by the tenant, unless he can prove that it was done by a third party.* In Kilkerran's report of the case of Robertson,^b there is the following passage; "and whereas, a doubt
 " was stirred upon the import of the act of Parliament 1698, whether the tenant was liable,
 " though it be not proved, that he or any of his
 " family did the damage, upon this ground, that
 " although the first part of the act of Parliament
 " be general, subjecting the tenant, whoever may
 " have done the damage; yet, in the latter part
 " of the act, the tenant is declared liable for his
 " wife, bairns, and servants, but *cui bono* if he
 " was liable, whoever did the damage? The answer was, that, without doubt, the tenant is by
 " the act liable, whoever do the damage; and
 " the reason of the clause subjecting him for servants, &c. was to obviate a pretence that might
 " have been made by the tenant, that he was free
 " when the real delinquent was discovered."

From these authorities we should be led to conclude, that by whomsoever the trees may have

* Fergusson of Auchinblain. *Supra*, p. 267.

^b *Supra*, p. 268.

been destroyed, the tenant is liable for those destroyed on his possession. But in a case, where the question was, whether it could be referred to the oath of the tenant, that ten trees above ten years old, which had been cut on his farm, had been cut by his order, it was found irrelevant to refer the point to the oath of the tenant.* If, however, the act of Parliament is to receive effect in the sense given to it in the case from Kilkerran, such a reference seems unnecessary. Was it not sufficient to have said, these trees were cut on the farm during the tenant's possession; by the act, he is liable, whoever cut them, and therefore the landlord has no occasion to bring any proof on the point. It is said, indeed, that "it was debated, but not decided, whether the tenant is liable for wood cut on his farm, unless he shall prove that the wood was cut by a third party." But there is a farther illustration of this point, in a case, where the Court found, "That, during the time libelled, at least twenty trees, upwards of ten years old, were cut in the pursuer's wood; that the stools of several of said cut trees were covered with clay and fog, to prevent discovery; that the defender gave orders for cutting and covering many of the stools of said cut trees: Finds, that any allowance the defender appears to have had from the pursuer, for cutting some timber for the use of the farm, is not a sufficient de-

* *Stirling v. Christie*, 4th December 1762. Mor. p. 9403.

“ fence for cutting so many trees, in a clandestine manner, and ordering the stools to be covered; and therefore, finds the defender liable in £20 Scots, for each of twenty trees, upwards of ten years old, cut in the pursuer’s wood, and decerns,” &c.* The following observation was made from the Bench, “ The case of Stirling v. Christie was directly in point, as to the construction of the statute 1698, but this case was erroneously collected, in so far as it states it to have been an adjudged point in that case, that the facts were not relevant to be proven by the oath of the tenant, whereas the Court had given no opinion on the general point, as to the relevancy of the proof, by the party’s oath, in such a case; as not being necessary in the cause then at issue: But, that the point itself, viz. that it was relevant to prove, by the oath of party, in actions for pecuniary penalties, had been decided in another case, Justices of Peace of Ayr, against the Town of Irvine, 24th Jan. 1712.”^b

On this point, therefore, the conclusion seems to be, that it was the meaning of this act to impose certain prices for the trees cut or destroyed by the tenant or his servants, &c. which might operate as penalties on the transgressors, and which might be imposed with justice, since those against whom they were directed had such opportunities of committing the offence, while they were bound to

* Logan v. Howatson, 21st July 1775. Mor. p. 10492.

^b Mor. p. 9398.

have protected, rather than to have destroyed the property in their possession. That by making the tenant liable for his family and servants, all questions, as to the solvency and responsibility of the offender, was taken away. In this view of the statute, a considerable advantage would be given to the landlord, without any great injustice to the tenant; whereas, by imposing on the tenant an obligation to pay the statutory prices, for such trees as might be cut or destroyed on his farm, (whoever might be the offender) would not only be extremely unjust, but contrary to the terms of the act. If this be the meaning of the act, then, the tenant is not indiscriminately liable for every tree, but for such only as can be proved to have been cut by him; or some one of his family: the question follows, whether, if there be no other proof, the matter can be referred to the tenant's oath? and to this point the reasoning in the case of Logan, in 1775, is applicable.

In treating of the rights of the parties in the lease, these observations may seem to be misplaced, and yet the connection is in some degree imposed by the Legislature itself, since it is in the character of tenant that the penalties of this act are made to affect him.*

* It has been found that the penalties awarded against tenants by the act 1698, c. 16, are subject to modification by the Court of Session. Some of the Judges were doubtful how far they had power to modify penalties expressly awarded by act of Parliament, but the majority, on the ground that they could not otherwise do justice, considered themselves entitled to interfere. *Cooper v. Campbell*, 18th Jan. 1805. Fac. Coll. Mor. App. *voce Planting and Enclosing*, No. 1.

On nearly the same ground on which the tenant is deprived of the growing timber, the sea-ware growing on the shores of the farm has been refused to him. The claim of the tenant to this article has been founded on its being part of the produce of his farm, on its being useful to him as a manure, and even for feeding his cattle; and being thus entitled to the sea-ware, the tenant has farther claimed the privilege of using it in the manufacture of kelp. But the tenant has right only to the yearly produce of the ground, whereas the sea-ware requires several years before it be fit for cutting or manufacturing into kelp. And as it is capable of being applied to purposes so different from that of manuring land, or feeding cattle, it cannot be held to have been in the view of parties; nor will it be included under any general expression in the lease, as, for example, that of "*part and pertinent*."*

3. It follows, as a necessary consequence of the right of property remaining in the landlord, that any loss, total or partial, which happens to the subject, during the currency of the lease, falls upon the landlord; and, of course, that the tenant is entitled to relief of the rent, in proportion to the dilapidation of the subject.

This is the case where the subject is destroyed; as, for example, where a house under lease is burnt down, the loss falls upon the landlord, and not upon the tenant, unless it has arisen from any

* *Campbell v. Campbell*, 2d June, 1795. Fac. Coll. Mor. p. 9646.

fault or carelessness of his. There is an example of the rule, as well as of the exception, in a case where a fire, which consumed the house, broke out in an upper floor, where the tenant had erected a comb-pot for dressing wool. An action was brought by the landlord for indemnification; in which it appeared, that it was not unusual, however dangerous, to erect such furnaces in the upper floors; but that certain precautions, which had been neglected in this case, were generally used, to prevent the fire from being communicated to the house. On the other hand, it appeared that the landlord had, for some time before, been apprized of the use to which the room was applied. The Court found, "that the comb-pot was erected in an improper manner, and that proper precautions had not been taken to prevent fire; and therefore found the defender liable in damages to the pursuer, and in expense of process." This is a decision founded solely on the negligence of the tenant;

* *Hardie v. Black*, 3d March 1768. Fac. Coll. Mor. p. 10182. The argument in this case is thus shortly stated in the Faculty Collection: The defender contended, that it was not every degree of neglect that would subject the person to damages, in whose house a fire broke out. In England, there is a statute which declares, that no action shall be competent for damages against any person in whose house or chamber a fire shall accidentally begin. In Scotland no such statute was required, as no action lay, except in the case of wilful fire, since there is no instance of any such action; for, in the case of *Sutherland v. Robertson*, 14th December 1736, Mor. p. 13979, the negligence of the tenant was exceedingly gross.—Answered, the tenant was guilty of neglecting the precautions commonly used, in such cases, for preventing the danger of fire, and must therefore be liable in terms of the act 1426, c. 75.

and while it proves that a loss, arising from his negligence, will fall upon him, it proves also, that where there has been no negligence, the loss will fall on the proprietor alone.*

In the same way, it is laid down by Stair,^b that where land set in lease is inundated or sanded, so as to have no fruit, it is the common opinion of all, that no rent is due. But this is a point which it will be requisite to consider under the head of the *tenant's rights*, when we come to inquire into his title to the fruits.

4. There remains to be considered a very important right vested by law in the landlord, viz. the right of hypothec, which confers on him a

Such was the argument as stated in the report; the act referred to is in these terms:—

Of fire, and the pains thereof.

Item, gif burning happenis in ony towne fra the fyre be stanchet, the alderman, baillies, &c. incontinent, sall enquire quhorathrow and how the fyre happened, and it be fynden on purpose deed, foresaunter sall be punition to them. And gif it happenis of misgovernance, and not of set purpose; if it be a servant, and that servant have guides, he sall be punished in his goods, &c.

Item, gif it be a man that awe the house, and burns it recklesly, or his wife, or his ain bairns, quhedder his neighbours takes skaith or none; attour the skaith and shew that he thowis, he or they sall be banished that towne for three zeires; and give it be a man, that maillis the house, and burns it recklesly, he sall amend the skaith after his power, and be banished the towne for three zeires, &c.

Item, gif fyre happenis in husband townes of berronies, we leave them to be punished by their Lordis, in the like manner as baillies and govounors does in burghs.

* *Fide Supra*, p. 192.

^b Stair's Inst. B. I. tit. xv. § 2.

real lien over the crop, stocking, and furniture of the tenant, in security of his rent.

The landlord's right of hypothec is one of the many hypothecs of the civil law which has been adopted by the law of Scotland. This hypothec does not appear to have owed its origin so much to any notion of property in the landlord, as to views of equity and expediency amongst a people to whom such liens were familiar. It was introduced by an edict of the Prætor, and gave to the landlord a real security over the crop for the rent of the land. This right, when confined to the crop, required no stipulation; but it was customary, in some cases, to extend it to the stocking on the farm, and then an express stipulation became necessary. This hypothec, once constituted, followed the effects over which it extended, into whose hands soever they went.

Our law of hypothec has been thought to originate in the right of property, in the produce of the land, which is conceived to remain with the landlord until the crop be separated from the ground; but this extension of the right of property does not explain all the peculiarities of the right of hypothec. Its true origin, with some trifling modifications, introduced from the differences of climate and of manners, rather appears to be in the Roman law hypothec over the crop. The right which, in the fertile soil and more favoured climate of Italy, affected the crop only, has been with us necessarily extended over both the crop and the stocking; but the interest of commerce has made an exception of sales in

public markets, or through the hands of third parties."

This right gives a security to the landlord over the crop of each year for the rent of that year, and over the cattle and stocking on the farm, for the current year's rent; which last right endures for three months after the last conventional term of payment. But, it may be necessary to consider particularly the effect of the right, with regard to these two subjects; and also to inquire how far it affects the furniture of the tenant.

The crop on the farm.—The rule with regard to the crop is, that the crop of each year remains hypothecated for the rent of that year, and for no other. This was fixed by a case, in which the Court found, that the crop remained subject to the landlord's claim for that year's rent, for which he ought to be preferred to all creditors, although he has used no diligence against the tenant for his rent; and in that case, seven years had elapsed since the crop in dispute, during which period the landlord had done nothing towards the recovery of the rent.^a In a question between the same parties, the Court gave effect to the landlord's hypothec, "seeing whatever was growing on the ground that year, whereof the rent was sought, was hypothecate for that year's rent to the master, *primo loco*."^b

The next question is, whether the crop can be

^a See on this subject *Kaim's Elucidations*, Art. 10. Law Tracts, No. 4.

^b *Hay v. Keith*, 24th July 1623. Mor. p. 6188.

^c *Hay v. Keith*, 3d February 1624. Mor. p. 6189.

hypothecated for the rent of any other year than that in which it grows. This question may occur in different shapes. It may be questioned, for example, whether the crop 1801 can be hypothecated for the rent of the preceding crop 1800; or whether it can be hypothecated for the rent of 1802.

Questions of this kind are sometimes perplexed by anticipating, or postponing the terms of payment of the rent. But it has been long settled, that the crop of one year cannot be hypothecated for the rent of a preceding year.*

* Crawford v. Sir John Stewart, 31st January 1737. Clerk Hume, No. 49; in Kilkerran voce Hypothec, No. 1. Mor. p. 6108 and 10431. Elchies voce Hypothec, No. 6; and Notes, p. 195. The case is thus stated by Clerk Hume:—"Sir John Stewart having taken a lease of the estate of Lanton from the Lords of Session, sublet the same to Alexander Cockburn and his son, for payment of 80,000 marks of yearly tack-duty, payable at Candlemas and Lammas 1732, for crop 1731; and so on, during the currency of the sub-tack, which commenced at Martinmas 1730. On the 9th October 1736, Mr. Crawford, being creditor to Sir Alexander in the sum of £1600 Sterling, sent a messenger to poind crop 1736, belonging to him; but before proceeding to execute the diligence, a bond was offered to the doer for the tacksmen, subscribed by Mr. Crawford and two sufficient cautioners, wherein they oblige themselves to pay the current year's rent, or any other sum that should be found due for the hypothec of that crop. And, in farther security, an offer was made to consign bank notes, to the extent of the tack-duty, in the hands of the Sheriff-depute, or his clerk." But the messenger being stopt in his poinding, an action was brought against the landlord, for payment of the debt due to the creditor. In this action the Court "found the crop 1736 not hypothecated for the rent 1735, and sustained the security or consignment offered as sufficient."

See Clerk Hume's report, in which the argument is very fully stated.

Kilkerran also reports this case with his usual ability, and gives that general view of the subject, which renders his reports so in-

There is another case reported by Kilkerran, where the crop was hypothecated for its rent, although that rent was payable at Martinmas and Whitsunday preceding; but this does not affect the point, and the question evidently arose, not from any doubt whether the crop could be hypothecated for its own rent, but from a doubt as to which was the rent of the crop.* The proper

structive. "FOUND, (says his Lordship) that a creditor, offering
 " to poind a tenant, may be stopped by the heritor, unless the cre-
 " ditor offer sufficient security for the rent, if the terms of payment
 " of the rent be not come; and unless he offer payment of the rent
 " of the farm, if the terms of payment be past: FOUND, that a
 " poindor, offering security to the heritor as aforesaid, *currente ter-*
 " *mino*, has right to insist for assignation to the rent and hypothec,
 " and may so qualify his offer, nor will it be a good answer for the
 " heritor, that he cannot be obliged to assign the hypothec in pre-
 " judice of his own debt of arrears due to him for former years;
 " for, in general, no such objection is competent against assigning,
 " but to one who has himself affected the subject for that debt, in
 " prejudice whereof he refused to assign: FOUND ALSO, that the
 " corns are only hypothecated for that year's rent in which they
 " grow. N.B. The hypothec upon corns lasts as long as the sub-
 " ject is extant. The hypothec on the stock, called the general hy-
 " pothec, lasts only till the last term's payment of the rent, and for
 " three months thereafter, as was found in Mr. Robert Hepburn's
 " case, in January 1726. During the currency of the term of pay-
 " ment of the rent, the master may stop a poindor if security be
 " not offered by the poindor, notwithstanding the poindor leave
 " sufficiency of fruits on the ground, or in the barn-yard; as was
 " found in Scot of Harden's case, in June 1736; because, by many
 " accidents, these may not be remaining at the term of payment;
 " but if the term of payment of the rent is past, it is enough if
 " the poindor, either to offer to pay the rent, or leave sufficiency of
 " fruits behind. Where the offering security is enough, it is not
 " necessary that there be also sufficiency left on the ground, as was
 " found in the present case, betwixt Mr. Crawford and Sir John
 " Stewart of Allanbank." Kilk. *vocs* Hypothec, No. 1.
 " Taylor v. Davidson, &c. 11th January, 1740. Kilk. Hypothec,

question was, whether the rent, payable at Martinmas 1747 and Whitsunday 1748, was the rent of the corn crop 1748; and it being the opinion of the Court that it was the rent of the corn crop 1748, the hypothecation of that crop, for the rent payable at Martinmas and Whitsunday preceding, was perfectly consistent with principle, and was by no means a decision, finding that the crop 1748 could be hypothecated for the rent 1747, and therefore is in no shape inconsistent with the decision in the former case.

If, then, crop 1801 cannot be hypothecated for the rent of 1800, it may be questioned whether it can be hypothecated for the rent of 1802. If it cannot be hypothecated for the former year's rent, it seems to follow, that it ought not to be hypothecated for the rent of the ensuing year. Yet there is one distinguishing circumstance. Were the crop 1801 to be hypothecated for the rent 1800, the creditor has no means of redress, and the interest of the landlord is extended farther than the principle on which it is founded will

No. 8. Elchies' Hypothec, No. 16. Notes, p. 198. Mor. p. 6197. This case is thus stated by Kilkerran: "When a tack was granted for 15 years, commencing at Whitsunday 1740, for the pasture ground, and for the arable land at Martinmas thereafter, and the tack-duty payable by way of foremail-rent, the one half at Martinmas 1740, the other at Whitsunday 1741, and so forth termly; the crop reaped in harvest 1748 was found to be subject to the hypothec, for the rent due at the Whitsunday; and a petition against the interlocutor of an ordinary, so finding, refused without answers. N. B. In reality, the first year's rent, though by agreement payable at the first Martinmas and Whitsunday after the entry, is paid for the year in which the first crop grows."

support it. But this does not follow where the crop 1801 is hypothecated or retained as a security for rent 1802; because, whatever part of crop 1801 is withheld from the creditor by the landlord, in security of the rent 1802, the creditor is entitled, in one shape or another, to recover from the crop 1802; and this may account for what Mr. Erskine states to be the practice: "All these fruits, (says he, in speaking of the landlord's power of retention,) whether yet growing, or in the tenant's granaries, are, by the present practice, without distinction of crops, of which they are the growth, understood to fall under the landlord's hypothec, as a security for that year's rent, in so far as relates to this right of retention. Thus, a landlord may stop a creditor, who offers to poind his tenant's corns, from carrying off even such of them as are the growth of a year, the rent of which has been already paid; unless he shall leave a quantity sufficient for the payment of the rent of that year, in which the creditor useth his diligence."*

Properly speaking, then, the crop of each year is hypothecated for the rent of that year, and for no other. At the same time, if Mr. Erskine's doctrine be correct, there is a right of retention of the crop on hand, for the rent of the current year's crop; but then the poinding creditor may, upon paying the rent of that crop, demand an assignation to the landlord's right of hypothec over the growing crop; so that the right of retention, which practice

* Ersk. Inst. B. II. tit. vi. § 58.

has introduced, neither enlarges the right of the landlord beyond its due bounds, nor limits that of the creditors of the tenant, though it suspends it, until the new crop be in existence.^a

The right of hypothec over the crop is necessarily attended with a right of retention against the tenant and his creditors; since, without such a power, the right of hypothec would be unavailing. This right of retention exists as long as the right of hypothec remains, but its effects, prior and subsequent to the term of payment of the rent, for which the hypothec is claimed, are different. This is owing to the difference in the landlord's situation during these two periods. Prior to the term of payment, the landlord cannot appropriate the crop to himself; he has merely a right in security.^b Subsequent to the term he

^a In Erskine's Principles, B. II. tit. vi. § 6, the rule is expressed, it is thought, more accurately than in his larger work. He says, "The heritor has, in security of his tack-duty, over and above the tenant's personal obligation, a tacit pledge or hypothec, not only in the fruits, as he had by the Roman law, but in the cattle pasturing on the ground. The corn and other fruits are hypothecated for the rent of that year, whereof they are the crop, for which they remain affected, though the heritor should not use his right for years together."—The doctrine thus laid down is conformable to the authorities and to practice, and differs somewhat from that stated above. See Bell's Commentaries, Vol. II. p. 104. 3d edit.

^b In certain circumstances, however, the landlord may apply to have the crop and stocking roused *currente termino*. In a case where the tenant, between the Martinmas and Whitsunday before his removal, was carrying off the corn, the Court instructed the Sheriff to grant warrant to rouse as much of the sequestered corn as would pay the whole hypothecated rents and expenses; the price to be lodged in the Sheriff-clerk's hands, subject to the order of the

has not only a right in security, but a right of immediate appropriation, in virtue of which he can apply the crop in payment of the rent.

This distinction has given rise to the practice which is followed in these two cases. Prior to the term, the landlord cannot appropriate the crop in payment of his rent; but were a creditor of the tenant's to leave no more on the ground than would be sufficient to answer the rent when it fell due, this, in many cases, would deprive the landlord of his right; since, what was left might be destroyed by some of the many accidents to which a crop is exposed. The landlord, therefore, is not obliged to run this risk, but is entitled to demand from the creditor, either consignment of the rent, or caution that it shall be paid.* A landlord may

Sheriff. From an inquiry ordered by the Court, it appeared that it was not customary for Sheriffs to grant warrants of sale of hypothecated effects before the term of payment. But the practice in the inferior courts was disregarded in the Court of Session. It is proper to mention, however, that in this case the whole proceedings, in so far as the tenant was concerned, were entirely in absence, *Sir A. Grant v. Sherris*, 10th March 1784. *Fac. Coll. Mor.* p. 6201.

A similar decision was pronounced where a tenant had fallen into embarrassed circumstances, and a warrant of sale of the crop and stocking had been obtained *currente termino*. Observed on the Bench, "Though a landlord's hypothec ought always to be exercised with discretion, yet, when the tenant fails in his circumstances, the landlord *currente termino* may justly sequester the stocking on the farm. In this power, that of rousing the subjects, especially cattle, is implied; since the expense attending their preservation might otherwise in the mean time often become equal to their value." *Dow v. Hay*, 25th June 1784. *Fac. Coll. Mor.* p. 6202.

* *Pringle v. Scott*, 30th June 1736. *Dict. Vol. I.* p. 417. *Elchies v. Hypothec*, No. 5. *Notes*, p. 195. *Mor.* p. 6216. This case is stated in the Dictionary in these words: "A pouding of a tenant's stocking

warrantably stop a poinding, in which the creditor refuses to find caution for the rent." But if the creditor offer a bond of caution, or consignment, in bank notes, for the rent of the current year, it will be sufficient. It is only necessary to observe, in regard to the caution to be offered, that, where the rent consists of a certain quantity of victual, the obligation must bind the parties to deliver, not simply so much victual, but victual the produce of the farm."

"having been attempted in October, while the corn crop was wholly in the barn-yard, much more than sufficient for a year's rent, the landlord interposed, and refused to allow the poinding to proceed, unless the creditors would find sufficient caution for payment of a year's rent. In a process against the landlord, for stopping the poinding, the Lords found the defender, in virtue of his hypothec for the current year's rent, did warrantably stop the pursuer's poinding."

* Crawford v. Stewart, 21st January 1737. Clerk Hume, No. 49, *Supra*, p. 278, and also Mor. p. 6216.

* Sir John Hall v. Nisbet, 2d June 1748. Kilk. Hypothec, No. 5. Mor. p. 6226. In this case it was found, that the offer of caution *currente termino* by the poinding creditor, did not entitle him to proceed with his poinding. Elchies *voce* Hypothec, No. 14. Notes, p. 197.

It would rather appear that, after the term of payment of the rent, a landlord, who interrupts a poinding, is not bound to assign his right of hypothec to the poinding creditor on his paying the rent. And if the poinding has been interrupted by the landlord's factor, who has merely a general power to grant discharges, but no power to assign, the poinding creditor must be content with a simple discharge for the rent then due, the landlord not being bound to be on the spot himself, or to have others there authorised to grant assignations; it being rather the poinding creditor's business to find out the landlord, and to pay him the rent, before he proceeds with his poinding. A v. B, February 1744. Kilk. Hypothec, No. 3. Mor. p. 6228. Elchies. Tod v. Montgomery, 10th February 1744. Hypothec, No. 11. This report differs in some particulars from Kilkerran's. See Elchies' Notes, p. 196.

This right of retention of the crop is good, not only against a creditor of the tenant's, but it also protects the landlord against an onerous and *bona fide* purchaser; in which respect it differs from the right of retention of the stocking on the farm. This point is quite fixed.^a In an old case, corn had been purchased in public market, between Christmas and Candlemas, and the price paid. The landlord pursued the purchaser for the rent due by the tenant, from whom the purchase was made, who insisted on the *bona fides* with which he made the purchase, and the bad consequences which would ensue to tenantry, were an action of this kind sustained on a sale in public market. He even proved, that there remained sufficient corn on the farm to have paid the year's rent at the time of the sale: but the Court, on the ground that the corn had been purchased before Candlemas, at which time only the landlord could have rendered his right effectual, held the purchaser to be liable for the rent.^b

This is, no doubt, a questionable decision, in so far as it subjected a purchaser in public market; but it would be repeated at this day, if the corn were purchased on the farm, in that case the landlord would be entitled to retain it

^a See Dict. Vol. I. p. 417. Mor. p. 6219. Scott, 11th June 1678. Fountainhall. Mor. p. 6223. Commissaries of St. Andrew's c. Watson, 11th January 1677. Dirleton. Mor. p. 6223. Lady Dun v. Dun, 31st March 1624. Durie. Mor. p. 6217. Hays v. Keith, 3d February 1624. Mor. p. 6217.

^b Hay v. Elliot, 29th March 1639. Durie. Mor. p. 6219.

against the purchaser, or to pursue him for the rent.*

Such is the practice prior to the term of payment of the rent; but after that term, when the landlord's right becomes active, he may instantly appropriate the crop for his payment. This practice is founded on a principle of substantial justice; and although there does not appear to have been any late decision on the point, yet the principle was early recognised. "The Lords sustained action at the instance of a master, pursuing the buyer of his tenant's corns upon his hypothec; though, at the time of the buying, the tenant had as much corns left behind, as would satisfy the master, and sow the ground; and found, he ought to have alleged that there was as much other corns left at, or after Candlemas; before which time the master could not meddle with the tenant's corns for his farms."^b

After the term, then, the purchaser of the tenant's corn, or the pawning creditor, must leave as much on the farm as will cover the rent of that year of which it is the crop. And it is proper to

* It seems now to be understood, that the landlord is not entitled to recover from a purchaser in public market; for in such open sale, the purchaser cannot be presumed to know of any undue purpose on the part of the tenant, and the landlord has himself to blame for allowing the grain to be carried off. This rule, however, it is to be observed, can apply only to purchases of grain brought to market by *bulk*, and not to a sale by *sample*. *Smart v. Ogilvie*, 10th December 1793. *Not reported*, but affirmed on appeal.

^b *Swinton v. Sinton*, 19th July 1627. *Dict. Vol. I. p. 418. Mor. p. 6218.*

observe here, that it is not enough that the creditor or purchaser should leave cattle or stocking on the farm to the amount of the rent; the landlord has the crop liable to him primarily; and, to render the proceedings regular, and unchallengeable, a quantity of *grain*, sufficient to pay the rent, must be left on the farm."

* Lady Dun v. Dun, 31st March 1624. Durie. Mor. p. 6217. In this case, Lady Dun possessed a farm in liferent, and her tenant in that farm, who rented other farms from the Laird of Dun, had delivered the crop of the farm, liferented by the lady, to his landlord, upon which she brought an action against him for the rent. Amongst other defences, he pleaded, "that at the time of his intromission, the tenant had as many horse, milt, kine, and sheep, as "would have paid the pursuer her rent; so that he ought not to "give back the corns, received by him *bona fide*." This was repelled; and the Court found, "That the corn growing on the ground "was first and principally hypothecated to the master for his farm, "in the which he was preferable to all others; and that he had his "first election of the corns before any other goods pertaining to the "tenant, if the master pleased to ask the corns, rather than of "the tenant's other goods, wherein the master had his preference "and election before others."

The grain left to cover the rent must be fully adequate for that purpose; for even after the landlord has attached by sequestration a quantity which may seem to him sufficient, he may have recourse against a purchaser in the event of a shortcoming. In a recent case, part of a growing crop was sequestrated by the landlord, and the remainder was sold by the tenant. The sequestrated corn, when reaped and sold, did not cover the rent, and the landlord proceeded to attach the remainder in the purchaser's hands. In a question between the purchaser and the landlord, the Court decided in favour of the latter. The purchaser pleaded, that enough had been attached at first to cover the rent, had it been properly managed. The landlord denied that he had any charge of the management of the crop, or that he was bound to take any; and the Court found, that the crop, even after sequestration, remained at the risk of the tenant, subject always to the landlord's

2. *The cattle and stocking on the farm.*—The cattle also on the farm are subject to the landlord's right; but the rule in regard to them differs from that which regulates the crop. The cattle are hypothecated for the current year's rent only. It is obvious, that, in order to render this right available to the landlord, without being dangerous or destructive to the tenant, a reasonable time must be allowed after the expiration of the year, within which the right may be exercised: since to confine it to the year would oblige the landlord either to use it on the term day, or to abandon it. The question does not seem to have occurred earlier than 1726. The rent of a farm was payable at Martinmas and Whitsunday; on the 10th June, one of the tenant's creditors carried off the cattle and other stocking, leaving only the growing crop. The landlord brought an action against the creditor, for the rent of the crop, the last half of which fell due at the Whitsunday preceding the 10th of June, when the cattle were carried off. The creditor insisted that the landlord's hypothec continued no longer than Whitsunday; and that his pouding having taken place a month later, was secure from challenge. On the other hand, the landlord represented the bad consequences which might ensue, from confining the landlord's right

interference, if he saw any thing like mismanagement. The Court had no doubt, that the landlord might interfere in such a manner as to incur a responsibility, and lose his recourse, but in this instance such a case had not been made out by the purchaser. *Brins v. Farrier*, 31st May 1815. Fac. Coll.

to the last day of the year, as well as the advantages resulting to all parties, by continuing it to the next term. The Court found, "That the master has *three months* after the term of payment to do diligence upon his hypothec against his tenant and stocking."

In order therefore to render the landlord's right of hypothec effectual over the stocking for the year's rent, sequestration must be applied for within three months of the last conventional term of payment. But this preference in favour of the landlord cannot be extended beyond the three months: should a creditor during the currency of that time carry off the cattle by poinding, the landlord may recover from him, provided he makes his demand judicially, within three months after the conventional term of payment of the rent; but the landlord has no preferable claim after that period, on the ground that the poinding creditor, by using diligence during the currency of the three months, has incurred a responsibility which may be made effectual at any time. During the three months, as well as afterwards, the stocking is exposed to the diligence of the tenant's creditors, with this difference only, that at any time before the expiration of that period, the landlord's claim for rent may be rendered preferable to that of a poinding creditor.^b

^a Hepburn v. Richardson, January 1786. Home's Coll. No. 76. Mor. p. 6205.

^b Horriesson v. Shaw, 19th June, 1766. Fac. Coll. Mor. p. 6211. Sir J. Cathcart v. Mitchell, 26th July, 1775, Fac. Coll. Mor. p. 6212. In the reference to Sir J. Cathcart's case, in the Index to

The right of hypothec over the cattle on the farm differs from the hypothec over the crop, in this respect, that the hypothec over the crop is special, covering every part of the crop; whereas the hypothec over the cattle is general, and requires the interposition of a judge to render it special, and applicable to the individual cattle. To what this distinction may be attributed, it is not very material to inquire; one thing, however, is evident, that, in the management of a stock of cattle, many circumstances may occur, to render it necessary for the tenant to enlarge or diminish his stock; expediency, therefore, requires that his power of disposal should be as little fettered as may be consistent with the rights of the landlord. Accordingly, the tenant has a power of selling his cattle, and if the sale be fair and onerous, it will be effectual; and the only way in which the landlord can protect himself against such sales, is by a previous sequestration of the tenant's cattle, which gives him a lien over each of them.*

the Fac. Coll. and in Mr. Merison's Synopsis, it is said that the Court was of opinion, that landlords are not strictly limited to the three months. All that is said, in the report of the case, of the opinion of the Court is, that they "considered the case of *Rorrican v. Shaw*, where the point was determined to be narrower than the present. And in respect of the long *mora* on the part of the landlord, the Lords sustained the reasons of suspension." It is probable, however, that were a similar case now to occur, the Court would consider themselves strictly limited to the three months.

* See the case of *Sir F. Rutherford v. Scott*, 20th June, 1736. Clk. Hume's Coll. Mor. p. 6926. And *Elchies v. Hypothec*, No. 4. Notes, p. 195. In this case, the landlord had obtained decree against his tenant for certain old arrears of rent, which did not fall under the hypothec. After the decree, but before any thing

This, it will be observed, constitutes a remarkable distinction between the effect of the landlord's hypothec over the crop and that over the stocking of the farm: but although this privilege be given to an onerous purchaser, where there is no room to presume collusion to the landlord's prejudice, yet a creditor, who has carried off the cattle by poinding, will not be secure against the landlord's action of recovery. This was doubtful at the time Mr. Erskine^a wrote; but has since been settled by a decision:—The creditor of a tenant executed a poinding of certain cattle on the farm; on which the landlord brought an action of spuilzie against the poinding creditor. The creditor maintained, that unless the landlord's hypothec over the cattle be rendered individual by sequestration, it is merely general, and the tenant may dispose of the cattle by sale, which will be effectual to a *bona fide* purchaser. In the same way

had been done upon it, the tenant sold to a *bona fide* purchaser 280 sheep, which were delivered. After this sale the landlord, under the decree for the arrears, executed a poinding of the tenant's effects; and having impleaded the proceeds of the sale of these effects to the payment of the arrears of rent, he instituted an action against the purchaser for recovery of the sheep, on the ground that they had been carried off to the prejudice of his right of hypothec for the current rent. But the Court found, that the purchaser, having *bona fide* received the sheep, is not bound to restore them to the landlord in virtue of his right of hypothec, since it appeared that goods, sufficient to pay the current rent, were left upon the ground, and afterwards intrusted with by the landlord; who, in a poinding for arrears not falling under the hypothec, has no preference over other creditors, but according to his diligence. From *Elchies'* Report of this case it would rather appear that it was a creditor and not a purchaser who had carried off the sheep. See also *Butter v. Sir James Riddel*. Bell's *Svo Cases* 1793, voce *Competition*.

^a *Forst. Inst.* B. II. tit. vi. § 41.

it was argued, an onerous creditor may carry off the cattle by legal diligence. To this it was answered, that the case of a creditor is very different from that of a *bona fide* purchaser. The creditor must attach the stocking, *tantum et tale* as it stands in the person of the tenant; that is, the stock liable to the landlord's hypothec. The Court found the pouncing creditor liable to the landlord for the value of the goods carried off, and intromitted with by him.*

This right of hypothec over the cattle, therefore, covers the current year's rent, and may be made effectual at any time within three months after the last conventional term of payment. It does not, like the hypothec over the crop, prevent the tenant from disposing of the cattle; though this too may be attained by sequestration. But a collusive sale will be ineffectual; and a pouncing, at the instance of a creditor, will not defeat the landlord's right.

3. The furniture belonging to the tenant is another subject over which the landlord's right of hypothec has been supposed to extend. The hypothec over the *invecta et illata*, in houses within burgh, has been introduced from necessity; but there was no necessity for this, in regard to the tenant of a farm; and accordingly our Judges have had difficulty in disposing of this question; and although they found the landlord entitled to hold the furniture in security for his rent, they were at a loss to say whether it was under the right of hypothec, or in virtue of his right of re-

* *M'Dowal v. Jamieson*, 15th February 1781. Mor. p. 6215.

"vention. A case is reported by Lord Kilkerran,
 in which the Lord Ordinary found, that the hypo-
 thec did not extend to the household furniture;
 " for which he gave this reason, when the peti-
 " tion against his interlocutor was moved; that
 " *in prædio rustico* the hypothec extended only
 " to the fruits, and that such he considered even
 " cattle to be, as being brought up and maintained
 " on the grass or fodder. Upon advising this
 " bill, the Lords rather hesitated than gave any
 " positive opinion; they however seemed to think,
 " that though the hypothec might not extend to
 " the household furniture, the master had a right
 " of retention thereof, and some said, that such
 " to their knowledge was the practice: And
 " as it was doubtful but there might be some
 " decision upon the point, without appointing the
 " bill to be seen, it was remitted to the Ordinary.
 " Meantime, the Court was clear, that as in this
 " case the tenant was a gentleman; and whose
 " household furniture exceeded that of an ordinary
 " tenant, in no event, be it hypothec, be it right
 " of retention, could it go farther, than to the ex-
 " tent of such furniture as might be suitable to an
 " ordinary tenant; and the case having lain over
 " till now, little farther light was got; no former
 " decision being found, and the Ordinary, in
 " consequence of the hint given, when the petition
 " was remitted to him, having ordered an account
 " of the furniture to be drawn out, distinguishing
 " what appeared to be proper for an ordinary ten-
 " ant, and what this tenant had as of a superior
 " rank; and by that account, the furniture suit-

"able to a tenant, amounting to £318 Scots, the
 "Ordinary, without determining whether it was
 "hypothec or right of retention, preferred the
 "landlord to the extent of the £318, and the
 "other creditors acquiesced."

* *Alison v. Creditors of Campbell*, July 1748. *Kilk. v. Hypothec*, No. 6. *Mor.* p. 6246. *Elehies v. Hypothec*, No. 13. *Notes*, p. 197. In France, the same question had created some difficulty. Pothier, in his *Traité du contrat de Louage*, No. 228, after stating that by the law of hypothec, as established in the Roman Jurisprudence, the landlord's security was not extended over the furniture of the tenant in a farm, says, that the customs of Paris and of Orleans, "accordent aux locateurs de métairies, une espèce de droit de gage, non-seulement sur les fruits qui y naissent, mais même sur les meubles, que les fermiers ont dans les dites métairies, tel que l'ont les locateurs des maisons de ville."

"À l'égard des Coutumes, qui ne s'en sont pas expliquées, il se trouve au premier tome du Journal des Audiences, viii. 25, un Arrêt du 22, Nov. 1655, qui a jugé que les locateurs des métairies et biens de campagne n'avoient ce droit que sur les fruits, conformément aux loix Romaines et non sur les meubles; la coutume de Paris qui l'accorde, ne devant pas à cet égard faire loi hors de son territoire, il ne paroît pas que cet arrêt ait été suivi, car Basnage, en son *Traité des Hypothèques*, atteste que c'est un usage général de la France coutumière, que les locateurs des métairies ont ce droit sur les meubles comme sur les fruits."

We may perceive in this the causes of that indecision which affected our Judges: the Roman law gave a right of hypothec to the landlord of an urban tenement, but refused it over the furniture of an agricultural tenant; and hence the wish on the part of our Judges to give a right to the landlord, without acknowledging it as a right of hypothec, for which they had no precedent in the Roman law. This point, in so far as it regards the furniture of an agricultural tenant, can scarcely be considered as fixed.

It may not be improper here to state the import of some of the recent decisions concerning the landlord's right of hypothec in urban tenements. This right seems to resemble the hypothec over the stocking of an agricultural farm, and extends generally over the *inventa et illata*, including not only the furniture of the tenant, but, as some authorities seem to imply, even his wearing apparel. See

Sub-lease.—In order to ascertain the effect produced on the landlord's right of hypothec, where

the Countess of Callender v. Campbell, 19th June 1703. Fount. Mor. p. 6244. Bell's Com. Vol. II. p. 101. And Lord Robertson's opinion in M'Pherson v. Christie, (*infra*, p. 296.)

This hypothec over *inventa et illata* is not confined to dwelling-houses, but extends to shops, manufactories, warehouses, cellars, &c.; and includes utensils, rude materials, and manufactured produce. Shop goods are also liable, but the landlord cannot, without a sequestration, prevent their being sold in the course of trade; and a *bona fide* purchaser, making the most extensive purchases, will be safe. But the goods of others, in a tenant's warehouse, will not be subject to the hypothec, the landlord's preference here, as in the case of cattle admitted to graze, being confined to the hire, when any is payable for such goods. Bell's Com. *ut supra*, p. 109.

Where, however, the tenant himself pays hire for the *inventa et illata*, practice and recent authorities seem to have fixed a different rule. Thus the hypothec attaches to furniture hired in by a tenant from a broker. In one case, a house had been furnished partly with the tenant's own furniture, partly with furniture from a broker, and partly with furniture for which no hire was paid. The landlord sequestered the whole furniture for rent without opposition from the broker; but, at the suit of the owner of the furniture which had been deposited or lent, it was restored, as not being liable to the hypothec. Cowan v. Berry, 31st January 1804, *not reported*, but noted in Wilson v. Spankie, 17th December 1813. Fas. Coll.; and in Bell's Com. Vol. II. p. 102. This decision, however, can hardly be considered as an authority on the point, since the broker did not appear; and all that it fixes is, that furniture *deposited or lent* to a tenant, does not fall under the hypothec; and even on this point, it appears that there was enough for the landlord without disputing the question with the owner of the lent furniture. But in another case, where the broker had actually got back his furniture, the Sheriff ordered it to be restored to the operation of the hypothec and the Court, on the ground, it is said, that brokers, in letting out furniture to hire, are aware of the risk they run, and in practice take a rate of hire which covers it: remitted to the Lord Ordinary to refuse a bill of advocacy of the Sheriff's judgment. Wauchope of Niddry v. Gall and Ross, 30th November 1805, *not reported*, but also noted in Bell's Com. *ut supra*. See also Bankton's Inst. Book I. tit. xvi. § 10.

there is a sub-lease, we must distinguish between the case where the sub-tenant has been approved of

One case, which is reported, confirms the rule, for it was there found, that a cautioner who had paid the rent, was entitled to an assignation of the landlord's hypothec over furniture hired from an upholsterer. *Stewart v. Bell*, 31st May 1814. Fac. Coll. corrected in App. to that Vol. of Reports.

The Court, however, have held the hypothec to be effectual over furniture belonging to the tenant's creditors, who had allowed it to remain in the house without hire. *Wilson v. Spankie*, 17th December 1813. Fac. Coll.

The mode of rendering this hypothec effectual, is by sequestration and sale; but as the tenant of a dwelling-house cannot possess without furniture, it is doubtful whether the furniture can be sequestrated *currente termino*, even when the tenant is *vergens ad inopiam*. *Wills v. Proudfoot*, 12th February 1800, not reported.

This hypothec does not cease by the removal of the furniture to another house on the term-day, for until then the landlord cannot demand his rent. Like the hypothec over stocking, it is understood to continue for three months after the term of payment of the rent; and if the furniture has been carried off, the landlord may follow it into the possession of another landlord, and render his right effectual by sequestration at any time within the three months. *Christie v. M'Pherson*, 14th December 1814. Fac. Coll. In this case Christie was M'Pherson's tenant, and with his landlord's consent he sublet the subject, a shop, to Halket. On the term-day Christie, the principal tenant, paid the rent to M'Pherson, but Halket, Christie's sub-tenant, did not pay the sub-rent. Christie's lease had expired at this term, and M'Pherson let the shop to Halket, who thus became principal tenant. After the term-day, and while Halket was sitting as M'Pherson's tenant, Christie the former tenant sequestrated Halket's effects within the three months for the sub-rent. M'Pherson maintained that the *inventa et ilata* were hypothecated to him for the current rent. Christie argued that his right of hypothec for the last term's sub-rent continued in force for three months after the term: that he enjoyed this right both as lessor of the sub-lease with the landlord's consent, and in virtue of an implied assignation of the hypothec of the landlord to whom he had paid the rent. The Court decided in favour of Christie, on the general principle that the landlord can follow the furniture into the possession of another within the three months.

by the landlord, and where he has received no such approbation.

The landlord will be held to have approved of the sub-tenant, where the lease contains a power of subsetting; he will also be held to have approved of him, where he has received rent from him, and granted him discharges; in other cases, he will be at liberty to disregard his right.

1. Even where the sub-tenant has been acknowledged by the landlord, the landlord will be entitled to draw the sub-rent in payment of the rent due to him by the principal tacksman;* and having thus a right to the sub-rent in whole, or in part, he must consequently enjoy the same right of hypothec over the crop and stocking of the sub-tenant, for securing payment of that sub-rent which he had when the lands were in the possession of his own immediate tenant. But it is obvious, that unless the sub-tenant be interpellated by the landlord, this right can last only until the term of payment of the sub-rent; for the sub-tenant being bound to pay at a certain term, and being approved of by the landlord, it follows, that when he *bona fide* pays his rent at the stipulated term, he pays with safety.

*The practice of the inferior courts in Edinburgh was proved to be in conformity with his decision.

As in urban tenements a power of subsetting is presumed unless the contrary be expressed, it seems to be held that if the sub-tenant pays his rent *bona fide*, and at the regular time to the principal tacksman, he will be free from any claim at the instance of the landlord. Bell's Com. Vol. II. p. 103.

* Anderson v. the Town of Edinburgh, 31st January 1665. Stair. Mor. p. 6235.

It is therefore only where the landlord has properly interpellated the sub-tenant prior to the term of payment, or before the sub-rent is paid, that he can insist for the sub-rent from a sub-tenant whom he has approved of; consequently, his right of hypothec over the sub-tenant's crop and stocking will be restricted to the sub-rent, whatever it may be.

It was found, in a case which was very deliberately decided, that a *bona fide* payment will be effectual to the sub-tenant, when made after the term of payment. This case also shows the principle which will regulate the decision where the sub-tacksman has not been acknowledged by the landlord. The tenant, in the case referred to, had power to subset the farm, and he subset it to certain sub-tenants, who for many years had paid their rents to the principal tacksman, without challenge from the landlord. At last the principal tacksman, after receiving the term's rent from the sub-tenants, failed to settle for that term with the landlord, who applied for a sequestration of the crop and stocking of the sub-tenants, in payment of the principal rent. The sub-tenants relied much on the power of sub-setting, granted to the tenant, which they maintained was equivalent to a conveyance of the landlord's right of hypothec, and he having empowered the tenant to receive the rents due by the sub-tacksman, could not be allowed to insist that they should pay their rents a second time to him. The Lord Ordinary found the landlord entitled to demand the rents from the sub-tacksman, notwithstanding their having

paid *bona fide* to the principal tenant.* But this judgment was altered by the Court; there was a great diversity of opinion among the Judges. It was observed on the Bench, that this decision was not to be viewed as determining in general, that where subsetting is merely *not prohibited*, the landlord's hypothec can be excluded by payments made after the legal term to the principal lessee: for here the special power to subset, and the long and uninterrupted use of payment by the

* The terms of the judgment were these: "Finds the heritor's real right and security of hypothec for his principal tack-duty or rent, so long as it continued in force, did extend to and affect the whole crop and stocking, upon all and every part of the land let by him in the principal tack thereof, whether such crop or stocking belonged to the principal tacksman himself, or to the defenders and others his sub-tenants; and was neither excluded nor restricted in its effect by the principal tacks bearing a power or licence to the tacksman to subset the said lands: Finds that it was not necessary for preserving the said heritor's hypothec, that he should, either before or after the term, interpel the defenders whom he had not accepted of as his tenant, from paying their sub-rents to the principal tacksman, under whom they possessed; but that the said sub-tenants, when making such payments, did it at the hazard of their crop and stocking, being still affected by the heritor's legal right of hypothec; in case the principal tacksman should fail to pay up to him the whole of the principal tack-duty, for security of which that hypothec was still subsisting: And therefore finds, that as the pursuer obtained a sequestration of the whole crop and stocking on the lands contained in the principal tack, within less than three months after the said term of Martinmas 1782, when the principal tack-duty in question fell due, the intermediate payments made by the defender to the principal tacksman, or discharges of the sub-rents, granted by him to them, could be no bar to the said sequestration, and that the said sequestration must still subsist accordingly."

sub-tenant, seemed to have considerable weight with some of the Judges.*

This case, therefore, contains the whole doctrine on the point; the Lord Ordinary's judgment fixes the rule where the sub-tenant has not been acknowledged by the landlord, and shows us, that payments made by a sub-tenant in such a situation, though made after the term of payment, expose him to the risk of being obliged to pay over again, if the principal tenant should fall in arrear: While the judgment of the Court shows, that a power of sub-setting contained in the lease, will be held equivalent to an approbation of the sub-tenant by the landlord; and of course will save the sub-tenant from any demand of repetition, where his payment to the principal tenant has been made *bona fide*, and after the regular term of payment. As long as the sub-tenant's rent remains unpaid, the landlord, of course, may sequester his crop as well as the principal tenant's, for payment of the rent.

Before leaving the case, where the sub-tenant has been approved of by the landlord, it may be remarked, that the question with regard to the effect of the hypothec, where there is partial sub-lease, remains as yet undecided. Can a landlord, where he has received a sub-tenant in a part of the farm, demand from him the whole of the principal rent; and is the sub-tenant's crop exposed to the hypothec, or the whole of the principal

* *Blane v. Morison*, 8th March 1786. Mor. p. 6232.

rent; or must the landlord restrict his demand to a proportional part of the principal rent, corresponding to the sub-tack duty payable by the sub-tenant? With reference to what ought to be the effect of the landlord's consent, and to the equity of the case, we may fairly conclude, that were such a question to occur, the landlord's claim and the extent of the hypothec would be limited to the sub-rent.^a

2. Where the sub-tenant has not been received by the landlord, the whole corn and stocking on the sub-tenant's possession remains hypothecated to the landlord, for the rent due to him by the principal tenant.^b



^a See Bell's Commentaries, Vol. II. p. 103, 3d Edition, where a different opinion is intimated. Mr. Bell seems to think, that on strict principle, the sub-tenant cannot oppose the landlord's universal right, and that all to which a sub-tenant, in such circumstances, is entitled, is an assignation to the landlord's right, so as to enable him to operate his relief against the principal tenant, or other sub-tenants.

^b Lord Salton v. Club, 25th January 1700: Fount. Mor. p. 1821, and p. 6224. In this case, Lord Salton had set certain lands to Fraser, part of which he subset to Club; and Fraser having become bankrupt, Salton pursued Club; and, in virtue of the right of hypothec over the lands possessed by Club, insisted for the rents due by Fraser. Club resisted the demand, on the ground that he could be no farther liable than for the rent payable by him to Fraser. The landlord on the other hand maintained, that he was at liberty to distress any part of the land set to Fraser for the whole rent, as far as the crop will go; and he has no concern with the amount of Club's sub-rent. The Court "found, that it "would diminish exceedingly the master's privilege of hypothec, "if his tenant sub-setting a part, he had only access to compel "the sub-tenant to pay no more than his tack-duty amounted to; "but found the hail fruits growing on the ground subset were "impignorate to him for the rent, as well as the fruits and goods "on the rest of the ground, unless he had accepted him as sub-tackman."

Cattle taken in to graze.—Mr. Erskine seems to consider it as not altogether a settled point, whether the cattle of others taken in by a tenant to graze are subject to the landlord's hypothec. It has been long ago decided, however, that the hypothec does not extend to such cattle.^a Here the landlord's preference is confined to the grass-maill due by the owners of the cattle for their pasturage, and secured by the tenant's right of retention.^b

Having thus, in some degree, explained the nature of the landlord's hypothec, and of the right of retention which he enjoys, we have next to consider the landlord's privilege with reference to the case where the subject of the hypothec is ear-

^a Brown v. Sir J. Sinclair, 19th November 1794. Edgar's Decisions. Mor. p. 6204. And, assuming the point as perfectly settled, in a later case, where a tenant had taken a farm, consisting of several large enclosures laid down in grass, into which he received the cattle of others to graze, instead of stocking the farm with cattle of his own; the Court found the landlord entitled to remove the tenant on his failure, to prove that the value of his own property on the farm was sufficient to cover the rent. Ross M'Kye v. Nabony, 4th December 1780. Fac. Coll. Mor. p. 6214.

In the neighbourhood of large towns, where the practice of letting enclosures for the express purpose of grazing the cattle of others is very common, it is probable that the tenant will provide against such questions, by stipulating that the landlord shall be satisfied with a cautioner for the payment of his rent. A course which will also be followed where grass parks are let to a tenant, who cuts the grass and carries it immediately to town for sale. In the latter case, the landlord will not likely relinquish his right of hypothec, even on caution, except to the extent of allowing the tenant to cut and carry off the grass for sale; so that, in competition with the diligence of creditors, the hypothec over the crop will be effectual. *Bell's Commentaries*, Vol. II. p. 101.

^b Ersk. Inst. B. II. tit. vi. § 62.

ried off the farm, either by the private act of the parties, or by legal diligence.

1. *Where the subject is carried off by the private act of the party.*—Were the landlord's right of preference to be defeated, the instant the subjects of the hypothec were removed from the farm, the right itself might be rendered in a great measure nugatory. Our practice, therefore, has not only afforded the landlord redress in such circumstances by means of judicial proceedings, (as we have already seen), but it has also permitted him at his own hand, without waiting for the authority of a judge, to bring back to the farm *via facti* the crop and stocking, where they have been carried off by the private act of the party. As this privilege of *brevi manu* recovery, however, might be attended with more danger than advantage, could it be resorted to at any time after the removal of the effects; our authorities agree that it must be exercised *de recenti*, an expression which in this instance has been construed in practice to signify within 24 hours after the effects sought to be recovered have been carried off.* If the landlord attempt to avail himself of this pri-

* Crichton v. the earl of Queensberry, 11th December 1692. Stair. Mor. p. 6203. In this case the tenant removed a flock of sheep from the farm before Whitsunday without paying his rent, and the landlord, *de recenti* on the first notice of the removal, and within 24 hours, caused the sheep to be driven back to the farm, in virtue of his privilege as landlord. The tenant pursued the landlord for a spultie, but the Court sustained his defence, "for they considered that the power of retention, without recent recovery, would be of no use, unless the master kept a watch upon his tenants, which were impossible."

vilege after the lapse of that time, he will expose himself to an action of spulzie. Even a warrant of the Sheriff, if it has been obtained *de plano* on the landlord's application, will not entitle him to carry back the effects to the farm, if they have been once settled on the grounds, or in the possession of a purchaser; nor will it alter the case that the sale has been collusive, the only remedy in such circumstances being by a regular process before the Judge Ordinary.*

2. *When the effects are carried off by legal diligence.*—In this case there does not appear to be any good reason for allowing the landlord to interpose *de recenti* and *via facti* to carry back his goods. There is not the same privacy as in the former case, the removal of the effects cannot be accomplished so expeditiously, and the whole proceeding bears the character of a judicial act, which a party ought not to have the power of overturning at his own hand: besides, the landlord has

* Ersk. Inst. B. II. tit. vi. § 60. *Park v. Cockburn*, 9th February 1676. *Dirleton*, No. 329; and *Stair. Mor.* p. 6203. Here the tenant had privately carried off during the night a flock of sheep, which he sold to his brother-in-law who had got possession. The landlord, by warrant of the Sheriff, without process or citation, seized upon the sheep in virtue of his right of hypothec; and in an action of spulzie, at the instance of the purchaser against the landlord, the Court held this to be a *wrongous intromission*, and that neither the landlord nor the Sheriff, without citing the party, "could warrantably bring back the goods *ex intervallo* except it had been recently after the removal thereof, but that the buyer was liable "as intromitter for the year's rent, if there were not sufficient goods "beside." It was admitted by the pursuer, that the landlord might have arrested the sheep, where they were, to abide the result of a regular process.

himself to blame for not interfering *debito tempore*. When this question occurred, the Judges were at first inclined to adopt the case of *Crichton v. the earl of Queensberry*^a as a precedent, and to support the landlord's privilege; but on reconsideration, they seem to have been satisfied of the difference between the two cases; and it was found, "that after the property was transferred by a regular poinding, without any opposition then made by the heritor, or any in his name, the heritor, or his factor, could not *via facti*, though within 24 hours, bring back the goods."

The next point of inquiry relates to the degree of preference to which the landlord is entitled under his right of hypothec, in competition with other attachments. The only attachment which, by the law of Scotland, can come in competition with the landlord's hypothec, is that of poinding, because the subject of the hypothec, in regard to the tenant, being moveable, can be attached by his creditors only by the diligence fitted for carrying off moveable property; though, considered

^a *Supra*, p. 303.

^b *Currie v. Crawford*, 25th January 1745. *Falc. Dec. Mor.* p. 6206. *Kilk. voce Hypothec*, No. 4. The difference between this case and *Crichton's* was observed to be, that in the latter the property was not transferred, whereas, in this, "the property was by a proper diligence transferred, which no man can *via facti* reverse." See also *Elchies Hypothec*, No. 12. Lord Elchies was at first against the judgment, but altered his opinion, "on a new consideration, that even a proprietor whose goods were erroneously poinded for another debt could not bring them back after the poinding was completed, but behoved to sue." *Elchies' Notes*, p. 196.

as it relates to the landlord, the crop more particularly may be regarded as of an heritable nature.*

Poinding, however, can never deprive the landlord of his right of hypothec; so far as that right goes, he is preferable to any poinder; and it is only as to old arrears of rent, and other debts not covered by the hypothec, that the diligence of the landlord will rank *pari passu* with that of other creditors, according to the common rules of pre-

* The landlord's right of hypothec is not affected by sequestration against the tenant under the bankrupt statutes. This was once decided, (*Buchan v. Nisbet*, 10th August 1781. Mor. p. 6272); and is expressly fixed by the last statute, (54 Geo. III. c. 177, § 5), which "saves the landlord's right of hypothec, which shall be no-wise hurt or impaired by any thing contained in this act."

Where arrears of rent, not covered by the hypothec, are due at the date of mercantile sequestration, the landlord is entitled to pursue a removing under the Act of Sederunt 1756, and to eject the tenant or the trustee for his creditors, unless the arrears as well as the hypothecated rents are fully paid up. *Nisbet and Company's trustee*, petitioner, 10th December 1803. Fac. Coll. Mor. p. 15268. In this case, the trustee wished to retain the lease for behoof of the creditors; and in an action of removing at the landlord's instance, upon the Act of Sederunt 1756, the trustee offered payment of the full rent due since the commencement of his management; but as to the former arrears, to cover which there were no hypothecated effects, he offered only a dividend. The Court found unanimously that the landlord was entitled to decree of removing, unless the arrears were paid in full, all assignees, whether voluntary or legal, being bound to fulfil the cedent's obligation. The landlord has thus, under the bankrupt statute, a direct exception made in favour of his right of hypothec; and when the creditors wish to continue in possession of the lease, this action of removing gives the landlord an indirect, but an effectual security for payment of those arrears for which, under his hypothec, he would have no preference over the other creditors.

ference.* But the landlord's right of hypothec yields to the Crown's preferable claim for taxes or penalties due by the tenant. This preference is founded upon the English statutes regarding the prerogative process of the Crown, which were extended to Scotland at the union of the kingdoms. The Act 33 of Henry VIII. c. 89, which is the leading one, makes the Crown preferable in every case where the creditor has not obtained *judgment* before the Crown's suit has commenced.^b And by the articles of Union it is provided, that the encouragements, protections, and restraints on trade, and the laws of the customs and excise, shall be the same in both countries:^c that the Scottish Court of Exchequer shall be established upon the model of the English Court of Exchequer: And the 6th of Queen Anne, which establishes that Court, enacts, "That the bodies, as well as the
 "lands and tenements, debts, credits, specialties,
 "goods, chattles, and personal estates, of all debt-
 "ors, or accountants to the crown, or their debtors
 "in Scotland, should be liable by extent, inqui-
 "sition, and seizures, or by any other process,

* Sir F. Rutherford v. Scott, 29th June 1736. Mor. p. 6226.
Vide Supra, p. 299.

^b Act 33 Henry VIII. c. 89, § 74, "That if any suit be commenced or taken, or any process be hereafter awarded for the King, for recovery of any of the King's debts; that the same suit and process shall be preferred before any other person or persons, and that the King shall have first execution against any defendants, of and for his said effects, before any other person; as also, that the said should be taken and commenced, or process awarded at the suit of the King, before judgment given for the said person or persons."

^c Articles of Union, 6, 18, 19.

“ways, or means, to the payment of the said debts,
 “duties, and revenues to the Crown, in such, or
 “in the same manner and form as is used in the
 “Court of Exchequer in England in like cases.”
 There is an exception in favour of heritable es-
 tates, in these words: “Provided, nevertheless,
 “that no debt or duty, from any the debtors or
 “accountants to the Crown in Scotland, shall af-
 “fect or subject any real estate in Scotland, of
 “any such debtors or accountants, to the payment
 “or satisfaction of any such debt or duty, further
 “or otherwise, or in any other manner or form,
 “than such real estate may or ought to be sub-
 “ject and liable by the laws of Scotland.”

These enactments, it has been found, give a preference to the Crown in a competition with the landlord under his right of hypothec. In the first case upon the point, a collector of excise had obtained a decree against a tenant for payment of certain excise duties, but no farther steps had been taken until the landlord used sequestration; and had obtained warrant to sell the tenant's effects in payment of the hypothecated rents. The collector of excise then appeared, and, by a protest, prohibited the landlord, and all others, from interfering until the debt to the Crown should be paid. It appeared, that in England the Crown is preferred to the landlord, unless the landlord has by a legal diligence appropriated the tenant's effects: But in Scotland the right of hypothec is preferable to the diligence of the law, and ex-

* 6 Queen Anne, c. 26, § 7 and 8.

cludes it: Hence it seemed to follow, that as the completed diligence of the English law gives the landlord in England a preference over the Crown, so in Scotland a right which was preferable to the completed diligence of the Scots law, ought to exclude the prerogative process of the Crown; and, accordingly, the Court of Session, proceeding chiefly on the principle, that, in the application of these enactments, the laws of the two countries ought to be assimilated as much as possible, found, "That the landlord's right of hypothec over the crop and stocking of his tenant cannot be defeated by the prerogative process of the Crown, in virtue of the stat. 33 of Henry VIII., as extended to Scotland by the articles of Union, and the Act of Parliament the 6th of Queen Anne." But this judgment was reversed in the House of Lords; and the decision there has since been followed.^b

^a *Ogilvy v. Wingate*, 29th June 1791. Fac. Coll. Mor. p. 7884. House of Lords, 13th June 1792. It was "Ordered, that the interlocutors complained of, in so far as they declare generally that the landlord's right of hypothec over the crop and stocking cannot be defeated by the prerogative process of the Crown, in virtue of the statute 33 Henry VIII. as extended to Scotland by the Articles of Union, and the Act of Parliament of Queen Anne, be reversed: But that in respect the King's title does not sufficiently appear in the process, the cause be remitted back to the Court of Session, to inquire more particularly into the process, and the conduct thereof, whereby the effects in question are supposed to have been subjected to the king's title."

^b *Factor on Lealie's estate v. Tweedie*, 3d December 1793. Fac. Coll. Mor. p. 7889. The Lord Ordinary found, that the Crown's preference did not infringe on the right of hypothec, as established by the laws of Scotland before the Union; but the Court altered that interlocutor. According to the report of the case, "Several of

Such have been the decisions and the reasoning on this subject. The distinction between the

"the Judges considered the question as decided by the judgment of the House of Peers, in the case of *Ogilvy*; but, at the same time, expressed regret at that decision, as they still thought that the landlord's hypothec, as a real right, was saved from the prerogative process of the Crown. On the other hand, it was observed, that, by the express words of the 6th of Q. Anne, real estates only were saved from the Crown's preference, and declared attachable, in no other form than according to the rules of the Scotch law: that a mistake had arisen, by confounding a real right in the landlord with a real estate in the debtor, the latter which alone came within the reservation of the statute; and that, consequently, although the landlord's hypothec might be a real right to him, yet the subject over which it extended was personal, and as such liable to the preference of the Crown."

On the assumption that the Crown's preference, in competition with the landlord's right of hypothec, is fully established by the statutes referred to, and by the judgment of the House of Lords, in *Ogilvy v. Wingate*, two more recent decisions, the one in the Court of Session, and the other in Exchequer, have fixed, that, in construing these statutes, the term "*judgment*" signifies a final order of execution, which requires no further interposition of a Judge. In the first of these cases, two tenants having fallen in arrear of rent, the landlord applied to the Sheriff for sequestration; warrant of sequestration was issued 16th February, and the effects were inventoried and sequestered on the 20th of that month. On the 27th the sequestration was reported, and a warrant issued to sell. On the 3d of March an information on the part of the Crown was exhibited against the tenants as unlawful distillers, and a fine of £180 was imposed. On the 10th March, the warrant to sell not yet being executed, the officers of the Crown proceeded to levy their fine upon the effects of the tenants, and were stopt by a suspension from the Court of Session, till the point of the Crown's preference should be tried. Two questions arose, 1. Whether the right of the landlord, with the proceedings in the sequestration, did not amount to a pledge made real by possession? And 2. Whether at least the warrant to sequester, and the warrant to sell, did not amount to a *judgment* in the full sense of the English law? Opinions of English lawyers were taken on the point; and to prove the course of proceeding in sequestration for rents, reports were ordered from the Sheriff-clerks. It appeared from these re-

real estate in the landlord, and in the tenant, is, perhaps, not very satisfactory; and certainly, it remains to be explained, how it should happen, that proceedings in England should give the English landlord a preference to the Crown, while a Scots law right, possessed of powers, equal at least to those possessed by the English proceedings, does not produce a similar effect.

ports, that although, previous to the warrant for sale, some investigation is made as to the amount of the claim to be provided for, and the sum limited for which the sequestrator is to sell, the proper ascertainment of the landlord's claim is upon reporting the sale, when the landlord makes up an account of his claim, and on due investigation a warrant is granted for payment. The Court proceeded upon the great ruling principle which had regulated the judgment of reversal in Wingate's case; and recurring to the determination of the case in Parker, (the King *versus* Cotton) as establishing that till sale of the effects, the extent of the Crown does not come too late, they found the Crown in this case preferable; that the proceedings were not to be held on the one hand as equivalent to a pledge with possession, but only as equivalent to the mere *custodia legis*, which in England does not divest; and, in the other, that the warrant to sell was merely interlocutory, not final; and that in the sense of the term *judgment* in this question, nothing is equivalent to it but a final order of execution, which requires no farther application or interference of a Court. *Robertson v. Jardine*, 6th July 1802. Fac. Coll. Mor. p. 7891.

In the other case, the landlord, after sequestration for the rent, had obtained warrant to sell, and the goods had been actually sold, but the sale had not been reported. Six months after the time of the sale, a writ of extent was issued for taxes, on which the Sheriff extended the sum in the sequestrator's hands. A *sciri facias* was then issued for recovering this sum, to which a plea was entered on the ground of the sequestration; and on a demurrer for the Crown, the case was argued, whether the Crown or the landlord had a preference. The Court of Exchequer held the Crown preferable, as the process of the landlord had not been completed. *The King v. Johnston*, 29th June 1809, in *Exchequer*.

But it is unnecessary to say more on a point which the decision of the House of Lords has settled; and it may now be taken as a rule, that the prerogative process of the Crown excludes the landlord's right of hypothec.*

* It is proper here to take notice of the preference enjoyed by farm-servants for the last term's wages, in competition even with the landlord's right of hypothec; a question which has been solemnly settled by a recent decision of the First Division of the Court, upon principles which are likely to be the rule of all future decisions upon the point.

In the first case in which the preference of farm-servants came to be considered, the landlord was not concerned. The Court ordered the following state of the question to be recorded in the books of Sederunt as a precedent: "In a competition between the arresting creditors of a bankrupt tenant, upon the price of his effects, which had been sold by authority of the Sheriff, a question having occurred, how far the wages due to the farm-servants of a bankrupt tenant, for the term current at the bankruptcy, were to be considered as privileged debts, and preferable to arrestments, the Lords, before answer, ordained an inquiry to be made into the practice of the Sheriffs of the different counties of Scotland as to that point; and reports having been accordingly received of said practice from the Sheriffs of Edinburgh, East-Lothian, Perth, Ayr, Aberdeen, Lanark, Roxburgh, Renfrew, Dumbarton, Dumfries, Selkirk, Ross, and Kincardine, the Lords yesterday proceeded to take the same into consideration, and thereafter pronounced an interlocutor, finding that the wages due to the servants of a bankrupt tenant, that is, *to the servants kept for the purposes of the farm*, are privileged debts on the price of the bankrupt's effects, and are preferable to arresters." Melvil v. Barclay, 23d January 1779. Fac. Coll. Mor. p. 11853.

In the next case, the factor on the sequestrated estate of an agricultural tenant, who was also a carpenter, and employed workmen in that capacity, applied for the instructions of the Court in the division of the bankrupt's funds between his agricultural and mechanical servants; and, in particular, the factor wished to be advised, whether the *mechanical* servants had not a preference over the materials of the handicraft, similar to that enjoyed by the farm-servants. The case was remitted to the Lord

In closing the important subject of the landlord's hypothec, it may be right to bring under

Ordinary, who found, that "on the proceeds of the stocking, the landlord was preferable, *1mo loco*; the labouring servants, *2do loco*, to the extent of half a-year's wages; but the servants, the artisans, were only to be ranked as common creditors." The Court adhered to this interlocutor. But it appears, that in this case, which is very imperfectly reported, there were enough of funds both for the landlord and the farm-servants, so that there was not room for any question as to which should be preferred, and, in fact, the landlord was no party to the case. *White v. Christie*, 31st January 1781. Fac. Coll. Mor. p. 11863.

In *Lockart v. Paterson*, 14th November 1804. Fac. Coll. Mor. App. voce *privileged debt*, No. 2, it was merely found, that, in a question with an ordinary creditor, farm-servants hired from day to day, reapers for example, have the same preference which servants hired by the year or half year enjoy.

Hitherto no case appears to have been decided in the Court of Session, in which the landlord, under the right of hypothec, and the farm-servants of the tenant, under their privilege, came into competition. But in the year 1818 the point was considered incidentally, although the case was attended with specialities which prevent its being quoted as a decision upon the general question; and it is of importance, chiefly as having given an opportunity to the Lord Ordinary in the case, and the Judges in the Second Division of the Court, to express an opinion in favour of the farm-servants' claim. In the case referred to, the late Lord Reston issued the following *note*:—"The Lord Ordinary does not know that the general question, whether farm-servants for their wages for the current half-year, have a preferable claim even to the landlord, has been fully considered; the case, *White v. Christie*, 31st January 1781, is considered by Hutchison, Vol. II. p. 178, and Bell, (*Commentaries*) p. 310, as merely establishing that artisans have not the same privileges with farm-servants among the creditors of their masters; and although the Lord Ordinary in that case had found the landlord preferable to the farm-servants, it would not appear that his finding was necessary for the decision of that case, and was fully considered by the Court. On principle, the Lord Ordinary thinks the servant's right ought to be preferred. If a landlord became bankrupt with a farm in his natural possession, the farm-servants would be preferable to his creditors for the current

the reader's view the conclusions to which we have come.

"half-year's rent. Now the landlord's hypothec is founded on the old state of matters when the crop and stocking were wholly his; and both being rendered efficient by the labour of the servant, their preference seems to follow on the same principle. The Lord Ordinary frequently decided accordingly, when Sheriff-depute of Berwickshire. The present judgment, however, is founded on the special circumstances of the case." The Judges in the Second Division, at advising a petition and answers in this case, are said to have concurred in opinion with Lord Reston on the general question; but the case was decided on the specialties referred to in the Lord Ordinary's note. *Crosbie v. Bell*, June 1818, not reported. Lord Reston's note will be found in the printed papers in the case.

Since the case of *Crosbie v. Bell* another case has occurred, in which the Court had an opportunity of deciding the general question. In that case a farm-servant was engaged for a year from the term of Martinmas; his wages were to be £10 *per annum*. In the month of August following, the tenant's crop and stocking were sold by the landlord, but the proceeds of the sale did not cover the hypothecated rents. The servant presented a petition to the Sheriff of the county of Perth, craving that the landlord might be ordained to pay him his current year's wages of £10. The Sheriff-substitute, proceeding on the opinions expressed in the last-mentioned case of *Crosbie v. Bell*, and contrary to the former practice of the county, decreed in favour of the servant; but the Sheriff-depute altered the interlocutor, and found for the landlord. The servant appealed to the Circuit Court, and Lord Gillies, who heard the cause at Perth, was inclined to reverse the Sheriff's judgment; but as it appeared that the practice varied in different counties, his Lordship thought it proper to certify the case to the Court of Session, in order that the point might be settled by a solemn decision. The case was accordingly reported by Lord Gillies to the First Division of the Court; and after full argument by the Counsel for both parties, the Judges delivered opinions unanimously in favour of the servant's claim. Lord Hermsend considered the question an important one to landlords, but had never any doubt upon it. The crop is created by the labour of the servants; and if they had left the farm, there could have been nothing for the landlord. The fund being constituted by their skill and exertions

I. The landlord's right of hypothec extends,

1. Over the crop: 2. Over the stocking on

they are entitled to a preference over it for their wages. The same rule applies to bleachers and other artisans, all of whom are entitled to retain the *opus manufactum* until they be paid for the labour they have bestowed upon it. In the case of *Melvil v. Barclay*, farm-servants were found preferable to ordinary creditors upon the proceeds of the crop and stocking. The case of *White v. Christie* applies only to mechanical servants, and there appears to have been a sufficiency of funds for the landlord and the farm-servants; and the case of *Crosbie v. Bell* appears to differ from the present only in this, that the pursuer herded the cattle, and did not enter to his service until after the sequestration had been awarded: But this difference is not material. It is said, however, that the hypothec is a real right; so it is—but still it must yield to that which is necessary to its very existence. Lord *Balmuto* concurred in opinion with Lord *Hermand*. While his Lordship was Sheriff of Fife, it had been his practice to prefer the farm-servants. Lord *Succoth* was also of the same opinion. He believed that, in the majority of the Sheriff-courts, the practice was in favour of the servants. The principle seemed to be, that the rent is produced by the crop, and the crop by the labour of the servants; and it is no answer to say, that, upon this principle, the carpenter and the smith who made the plough ought also to be preferred, for the difference lies in this, that their labour does not, like that of the farm-servants, produce the crop *directly*. If the farm-servants were not preferred, the landlord would be better off than he would be were the lands in his own natural possession, for then the servants would be preferable to every one. Besides, it is for the landlord's interest that the preference should be allowed, otherwise the servants would desert the farm the moment the tenant became embarrassed. His Lordship took the same view that Lord *Hermand* did of the cases referred to. Lord *Balgrény* thought the preference of the servants could be supported on a variety of principles. Originally, the crop as well as the soil was actually the landlord's, from which it followed that the servants of the tenant were then the servants of the landlord, who, in the event of a shortcoming, must have paid them their wages. Now, although this state of matters be changed, his Lordship saw no reason for making any alteration on the servants' rights. It was never doubted that even after sequestration the tenant might lawfully take the sequestered corn for feeding

the farm: and 3. The tenant's furniture seems to be attachable by the landlord, so

the horses, and the sequestered meal for the maintenance of his farm-servants. If the landlord cannot object to these burdens being laid on him, upon what ground can he refuse to pay the servants their money wages, which are as much due to them as their victuals; in many places, indeed, there are no money wages, and the servants are paid wholly in kind. Farther, if the tenant neglects to cultivate the farm, both he and the farm-servants may be compelled to do so by the Judge Ordinary, on an application at the landlord's instance. But it would be strange indeed, were the landlord to have this power of compulsion over persons for whose labour he was not bound to pay, though the whole of it went for his benefit. As to the expediency of the preference there can be no doubt. Lord President Hope agreed with Lord Balgray, that the servant's preference was supported by various principles. Their services are *in rem versam* of the landlord; for the tenant manages the crop for the landlord's behoof, and can be compelled to do so. The servant's preference is acknowledged on all hands, so far as it operates against the tenant and his creditors; but it operates also against the landlord, because, by the servant's labour, the crop is created. All privileged debts rest upon the principle that the labour of the privileged creditor is *in rem versam* of the parties postponed, except perhaps the wages of menial servants and funeral expenses, which seem rather to rest on views of expediency. Even the preference given to physicians' fees rests upon this principle; for it must in general be advantageous to the creditors to keep their debtor alive. None of the reported cases regarding the preference of farm-servants appear to have been well decided; or, at least, the judgments have been too loosely expressed. *Melvil v. Barclay* goes too far. The Court there found the servants privileged "on the price of the tenant's effects." But it is clear that they can be preferred only on the produce of the farm. *White v. Christie*, if it is rightly reported, is still more extraordinary; and it is strange, that a Judge of Lord Hailes' information and acuteness should have erred so much as he there appears to have done. The question which came before Lord Hailes, was, "Whether the bankrupt's mechanical servants were not entitled to a preference upon the materials of his handicraft?" And what is the answer? He finds, that, "on the proceeds of the stocking," the landlord is preferable, *1mo loco*; the farm-servants, *2do loco*; but

as to afford him a preference over it for the rent.

1. The hypothec over the crop is effectual for the rent of the year of which it is the crop, and continues as long as the crop is extant.
2. The hypothec over the cattle extends to the current year's rent only, and continues in force for three months after the last conventional term of payment.
3. The nature of the hypothec over an agricultural tenant's furniture is not well ascertained, nor are our authorities sufficiently explicit to enable us to discover, whether it be an hypothec, or a right of retention, which is competent to the landlord.

II. The landlord has a right of retention of the crop and stocking on the farm, as long as the right of hypothec remains ; but,

that the artificers were to be ranked only as common creditors.— But upon what were they to be so ranked? Why, “*upon the proceeds of the stocking*,” a subject to which they had no claim. The case of *Lockhart v. Paterson* seems to be right enough. And it is worthy of remark, that the Court there expressed their decided opinion, “*that the Act of Sederunt was intended to give a preference for their wages over the crop raised or secured by their labour to all persons employed as farm-servants, however short the period of their service.*” The Court accordingly reversed the judgment of the Sheriff, and decreed in favour of the farm-servant for £10, being his current year's wages, and found him entitled to expenses. *M'Glashan v. the Duke of Athole*, 29th June 1819. *Not yet reported.* The Editor is indebted to one of the Appellant's Counsel for the notes of the opinions of the Judges.

1. Previous to the term of payment of the rent, the effects may be carried off by the tenant or his creditors, on their finding caution for the payment of the rent, or on consignment of it.
2. Posterior to the term of payment, the effects may be carried off only on payment of the rent, or on leaving on the farm a quantity of corn sufficient to cover the rent.

III. The landlord has a right also of bringing back effects, when they have been carried off the farm, under the exception of stocking, which has been fairly sold, but a distinction is to be made.

1. Where the effects have been carried off privately; and, in that case, the landlord, if he does it recently within 24 hours, may bring them back *brevi manu*, without the aid of a Judge; after a longer interval he can do so only by judicial authority.
2. Where the effects have been carried off by legal diligence, the landlord is not entitled to bring them back even *de recenti*, and within the 24 hours, by his own authority, but must apply for the authority of a Judge.

IV. The landlord's right of hypothec, so far as it goes, gives him a preference over a pouncing creditor; and, in general, over all the ordinary creditors of the tenant; but this right of preference yields to the prerogative

process of the Crown: And it is now also a settled point, that the farm-servants of the tenant are preferable for their last term's wages, even to the landlord claiming under his hypothec.*

II. THE RIGHTS ACQUIRED BY THE TENANT.

1. TO THE FRUITS.—The tenant, as such, has a right at common law to the fruits, and to the use and possession of the farm: the rent which he pays is the price of these, and hence the rent cannot be demanded, where the possession and fruits are not enjoyed by the tenant. According to Stair, “where the fruits and work doth altogether cease without the fault of the conductor, there the hire must also cease, because the one is given as the cause of the other, and the peril undertaken is not of the *being*, but of the *quantity* and *value* thereof: for instance, if land taken be inundate or sanded, and so have no fruit, it is the common opinion of all that the hire or cane ceaseth to be due for that time.” And farther, “though the opinion of the learned (he continues) be very diverse in the

* It would also appear that a creditor for *funeral expenses* is preferable, upon the defunct's moveables, to the landlord of a house, under his right of hypothec. *Rowan v. Bar*, 29th June 1742. *Kilk.* p. 138. *Mor.* p. 11852. In another case, house rent, for one year, seems to have been held as a *privileged debt*, independently of the hypothec, upon the same principle with the wages of domestic servants. *Lady Dunnipace, &c. v. Watson and Vert*, 6th July 1730. *Kilk.* p. 433. *Falcr. Mor.* p. 11452, and 11852.

† *Stair Inst. B. I. tit. xv. § 2.*

“ matter of the barrenness of the ground, some
 “ accounting it if the half of the ordinary increase
 “ fail, some of the third, and some leaving it to
 “ the common estimation of the place what it
 “ called barrenness, or to the arbitrement of the
 “ Judge; yet, I think it more rational to deter-
 “ mine that case with the rest, upon the former,
 “ that, if there be any profit of the fruit above the
 “ expenses, the rent should be due.”^a

Mr. Erskine says, “ that by the Roman law,
 “ the landlord cannot claim any part of the rent
 “ of the year, if inundation, the calamity of war,
 “ the corruption of the air, or the inclemency of
 “ the weather, by earthquakes, lightning, &c. hath
 “ brought upon the crop a damage *plusquam tol-*
 “ *erabile*; but if the loss be more moderate, he
 “ may exact the full rent, l. 25, § 6. eod. tit. It
 “ is no where defined in that law, what degree of
 “ sterility or vastation makes a loss that cannot
 “ be born. But, by the common opinion, the ten-
 “ ant is liable for the rent, if the produce of the
 “ crop exceed the expense of the seed and tillage.
 “ Though the landlord cannot in equity demand
 “ the tack-duty in the case above-mentioned; yet,
 “ as to the expense of seed and labour laid out
 “ voluntarily by the tenant on the subject, the
 “ profits of which were to accrue wholly to him-
 “ self, the landlord is not obliged, even in equity,
 “ to indemnify him of that expense; either in con-
 “ sequence of his right of property in the lands,
 “ or from the nature of the contract, *arg.* l. 15,

^a Stair Inst. B. I. tit. xv. § 2.

“ § 2, eod. tit. If the tenant's loss arise, not
 “ from the want of increase, but from the bad
 “ quality of the grain, *ex. gr.* from his corns
 “ having been blighted or spoiled by rain after
 “ reaping, or from the running out of his grounds,
 “ or the decay of his fruit trees, he is not entitled
 “ even to an abatement of rent on that account.
 “ If the next crop be uncommonly rich, it is bur-
 “ dened with the payment to the landlord, both
 “ with the rent of that year of plenty, and of the
 “ former year of sterility, d. l. 15, § 4. No ex-
 “ emption can be pleaded on account of an extra-
 “ ordinary sterility by a *colonus partiarius*, who
 “ pays a certain share of the increase, in name of
 “ tack-duty ; for, he being considered as a co-part-
 “ ner with the proprietor, rather than a tenant to
 “ a landlord, must, in that character, divide the
 “ loss with the proprietor, according to the pro-
 “ portions settled by the contract, l. 25, § 6; eod.
 “ tit. These rules have been adopted into the
 “ law of Scotland, not only in the opinion of
 “ writers, but by our decisions, so far as they
 “ have gone in the matter, particularly by Dirle-
 “ ton.”*

In these authorities, there are three points which require attention: 1. Where the subject of the lease is destroyed; 2. Where the produce is destroyed; and lastly, Where the lands have been affected with barrenness. These shall be considered in their order.

* No. 108. Mor. p. 10121. Home 213. Mor. p. 10128. Ersk. Inst. B. II. tit. vi. § 41.

1. *Where the subject of the lease is destroyed.*—It does not seem to create any distinction in this case, whether the loss be permanent or temporary, total or partial, farther than that the relief enjoyed by the tenant will correspond to the extent of the damage. Thus, “lands were set in tack, and thereafter overblown with sand; the tenant was found to have action to compel the setter, either to diminish the duty proportionally, or to suffer him to renounce the tack.”^a In another case of the same kind, where, in consequence of a new enactment, the profits of a lessee of public burdens had been diminished, he was found entitled to a proportional abatement of his rent.^b On the same principle, a house having become insufficient, the tenant was found entitled to an abatement of the rent.^c

These are cases where there was an actual destruction of the subject under lease; but there are others, where, from the nature of the risks incident to the contract, it is difficult to say, whether the loss be a loss of the subject, which ought to fall on the lessor, or a diminution of the profits only, which ought to fall on the lessee. Thus

^a *Lindsay v. Home*, 13th June 1612. Haddington. Mor. p. 10120.

^b *Crawford v. the King's Advocate*, 2d July 1696. Fount. Mor. p. 7866 and 10125.

^c *Hamilton*, 2d January 1667. Stair's Dec. Mor. p. 10121. See also *Deans v. Abercromby*, 15th December 1681. Harearse. Mor. p. 10122. No abatement was given where the access to a tavern was incommoded by the stones and rubbish of a neighbouring house taken down and rebuilt. *Steedman v. Kennedy*, 22d June 1744. *Elchies voce Tack*, No. 9. Notes, p. 444.

the lessee of a coal-pit, or of a salmon-fishing, is much exposed to losses; and when they happen, it is far from being easy to say whether they ought to vacate the lease. Where a coal-mine happened to fail, the rent was found not to be due; but the decision proceeded upon this, that, as the rent depended on the number of workmen employed, and rose in proportion to the quantity of coal brought up, it was reasonable that the rent should fail when the coal failed.* But, independently of the specialty which occurred here, there is certainly a clear line of distinction, in such cases, between the actual failure of the subject, and those impediments which may disturb the working of the coal and diminish its produce: the former ought to relieve the tenant, whatever the nature of his rent may be, while the latter can be considered in no other light than as one of those risks which are presumed to have been in contemplation of the tenant, at entering into the contract; and which, therefore, cannot be held as sufficient to liberate him from the rent he has engaged to pay.

A tack of a salmon-fishing is evidently a contract of the same kind: and on this point there is a very instructive case, in which the fishing let was on the north side of the river Tay, while there was a fishing belonging to another proprietor on the south side. The stream which, at the commencement of the lease, ran on the north side, and rendered the fishing on that side valu-

* *Wilson v. Mader*, 16th June 1699. *Fount. Mor.* p. 10125.

able, shifted in the course of the lease, and ran on the south side, by which the lessee's fishing was rendered altogether unprofitable. There was no dispute as to the fact, neither did the landlord dispute the general principle, that when the subject is completely destroyed, as where land is overflowed by the sea, the lease must be at an end, and no rent can be due: But he contended, that this was a case of sterility merely, in which the deficiencies of one year may be made up by the surplus of another; and, that it was by the loss or gain, on the whole period of the lease, and not on that of a single season, that the question ought to be decided. The Court sustained the defence, and found that the tenant was not liable in the rent for the two last years of the lease.* Lord Kaims complains much of this decision; he considers this as a case of sterility, but not a case where the subject was destroyed. But the subject let was a right to fish for salmon in a stream, on the north side of the river; and when the stream shifted to the other side, and out of the boundaries of the fishing, it seems evidently such a loss of the subject as fully authorised the decision.

The principle, therefore, seems to be sound, and to explain all the decisions on the point; viz. that where there is a loss, total or partial, of the subject let, there must be a proportional diminution of the rent payable by the tenant. There is a case, which may seem to be an exception

* Foster, &c. v. Adamson, &c., 16th July 1762. Select Decisions, No. 199. Mor. p. 10131.

to this rule, but which, on a more careful examination, will be found to support it. The inhabitants of the Canongate were in use to grind their grain at Canonmills; a lease of these mills, and of the multures thereto belonging, had been granted, and during the currency of the lease the inhabitants, who had paid erroneously, obtained a declarator of freedom. The tenant of the mills insisted that he was entitled to a proportional diminution of his rent on that account. But this was refused; and the Court found, that the tenant, having right by his lease to the mills and multures thereof, if he has been disappointed in his expectations as to what fell under these multures, it was not the fault of the landlord, and no abatement of the rent is demandable.* It is evident that the restriction which took place in this case was no loss of the subject let, for that subject was the mills, with the multures thereto belonging; and this decree deprived the tenant of none to which the proprietor of the mills had any legal right; of course, it in no sense diminished the subject actually let to the tenant: this decision, therefore, is no infringement of the general rule. But there is a later case, which seems to be an infringement, though it is so expressed as to support the rule, while the reason of the exception is left unexplained: It is thus stated in the Dictionary:—"Although the tenant is allowed an abatement of rent when any part of the subject perishes by unforeseen acci-

* *Heriot's Hospital v. Angus*, 1st July 1709. *Mor.* p. 10126.

“dent; the Lords found, that a tenant, who had formerly the use of a well, was not on account of its failure entitled to any deduction.”*

On this point, then, the rule seems to be, that wherever a subject under lease is destroyed, totally or partially, or rendered unfit for the purposes for which it has been let, the tenant is entitled to a proportional abatement of the rent. But it may be farther questioned, whether, in the case where a farm is inundated by the sea, or overblown with sand, the tenant, who has expended money in improving the farm, will not be entitled to a claim of damage against the landlord. There can be no doubt, were the landlord's title reduced, and the tenant on that account expelled from his farm, that a claim for damages would lie at the instance of the tenant against the granter of the lease. But the damage in that case arises from a cause which falls clearly under the warranty of the lessor; whereas, the damage in the case supposed, arises from a natural cause, not in the view of the parties, which they could neither foresee nor avoid. It is a cause, which, at the same time that it is destructive to the improvements of the tenant, is destructive also to the property of the landlord; and we may apply to it the principle which Mr. Erskine, on the authority of the civil law, lays down as applicable to another case, that, “as to the expense of seed and labour laid out voluntarily by the tenant on the subject,

* The Factor on Sharp's subjects v. Lord Monboddo, 6th July 1778. Dict. Vol. IV. p. 63. Mor. p. 10134.

“ the profits of which were to accrue wholly to himself, the landlord is not obliged, even in equity, to indemnify him of that expense, either in consequence of his right of property in the lands, or from the nature of the contract.”^a

2. *Where the produce has been destroyed.*—A distinction is made, where the destruction happens before, and where it happens after the reaping of the crop. Where a growing crop is destroyed, Stair holds, that if there be no profit above the expenses, no rent can be demanded. But he distinguishes this case from the other, and says, that the rule “ will not extend to private accidents be- falling the crop, after the growing or reaping, even though by accident it should be destroyed, or burnt without the tenant’s fault, the hazard being his own; because, it is not then reputed as the fruit, but as a body in being, whereof he hath the property and peril.”^b

3. *Where the lands have been affected with barrenness.*—There seems to have been some question as to what may be considered as sterility; but Stair reduces it to the former rule, that wherever the produce leaves no profit above the expense incurred by the tenant in raising the crop, the

^a May not the maxim *res perit domino* be applied in such a case as this, taking that maxim as explained in the House of Lords, in the case of *Bayne v. Walker*, to signify that the subject perishes both to the landlord and tenant, according to their respective interests in it, so that neither can have a claim against the other? See above, page 192.

^b Stair’s Inst. B. I. tit. xv. § 2.

sterility is such as to free the tenant from any obligation to pay rent. This principle came to be applied in a case where an extraordinary storm of rain and hail, accompanied with thunder and lightning, had laid waste the district in which the landlord's estates were situated. When the tenants were pursued for their rents, they pleaded, that, from the violence of the hurricane, they had not reaped what was sufficient to defray the expense of seed and labour. The landlord urged, that it is not a settled point whether even a total sterility for one year, affords the tenant, who has a lease for several years, any claim of deduction on account of the sterility of that particular year; and whether he ought not to compensate the loss of one year with the profit of another, since, in all such cases, each party must run a certain risk: The Court found no rent due by such of the tenants as had reaped no more than about the value of seed and labour.* Stair, in the passage quoted from his work, does not say *seed and labour*, but the expense incurred by the tenant; and there certainly may be expenses, which, on the assumed principle, the tenant would be entitled to charge, which would not properly fall under the expression of seed and labour. In this case, it is probable, there was a slump rent for the whole farm: but it may be considered, whether the same rule would apply to a farm let at so much an acre,

* The Earl of Eglinton v. his Tenants, 3d Dec. 1742. Kilk. *voce Periculum*, No. 2, and by Hume, No. 213. Mor. p. 10128. Elchies *voce Tack*, No. 8. Notes, p. 443. See also *Supra*, p. 191.

where the damage fell upon part of the farm only; for it would make a material difference if the damage of each acre and the rent of each acre were to be set against each other by themselves, and not in slump with the other parts of the farm. There is another case which seems to have been decided on something of the same principle. The duties of the customs of the borders were let to a tenant, who, being pursued for the rent, alleged that the tack was altogether unprofitable on account of the English invasion, there being no import or export that year, (1650). To this it was answered, that although in the case of a farm, where there is sterility, an abatement may be given; yet, in this case, which is a bargain of hazard, there is none. The Court found, that the tacksman was entitled to an abatement in proportion to the loss; and this abatement, upon an inquiry into the loss, was found to amount to one-half of the rent.*

2. THE USE AND ENJOYMENT OF THE FARM.

—Besides the fruits, the tenant has a right to the temporary use and enjoyment of the farm; and in virtue of the lease, he may exclude all others, in the same manner that the landlord himself might have done, had the lands been in his natural possession.

The right of property in land implies, beyond all doubt, an exclusive right to the possession. The proprietor may exclude every one, even from

* Tacksman of the Customs v. Greenhead, 20th Nov. 1667. Dirleton, No. 108. Mor. p. 10121.

his unenclosed property, on which no one has a title to intrude, either for recreation or amusement, without the owner's consent.* If this be the right inherent in a proprietor, this right must of course be communicated to the tenant, since without it he could not be said to have the use and enjoyment of the farm. In this view, the tenant, during his temporary possession, may exclude all others from the farm. But it is a question of some nicety, whether he is also entitled

* Marquis of Tweeddale v. Dalrymple, 3d March 1778. Fac. Coll. Mor. p. 4992. Earl of Breadalbane v. Livingstone, 16th June 1790. Fac. Coll. Mor. p. 4999. The last case is a very strong one. Livingstone, a landed proprietor, fully qualified to hunt, had hunted for some days on certain unenclosed muirs belonging to the Earl of Breadalbane—the Earl pursued him for the trespass. The question was, whether a proprietor had an unqualified power of excluding all intruders; and the Court of Session held, that he had, a judgment which was affirmed in the House of Lords. In the Court of Session, Livingstone argued, that the game laws of this country gave an unlimited privilege of hunting to qualified persons: that the intention of the law must be to strengthen the general right in every case where there is no restriction; and that in the case of unenclosed grounds, there never has been a restriction made by the Legislature, or understood in practice. To this it was answered, that it was not unusual for the Scottish Legislature to strengthen common law rights without impairing those rights to which the act did not extend; nor does it follow, that because animals *feræ naturæ* belong to the occupier, that any one is entitled to pursue or kill them on the grounds of another. The distinction is recognized in the Roman law, *non est consentaneum ut per aliena prædia invito dominis aucupium faciat*; and in the law of Scotland the distinction is no less clear: exclusive possession is implied in the very nature of property, and in every case where no servitude of statutory restraint exists, and where the public safety does not interfere, a proprietor has the same right to exclude all others from his landed property that he has to deny them access to his house.

to exclude the landlord. We have seen already that the landlord has right to enter on the farm in the exercise of his reserved power. He may enter it to search for and work mines, and he may do so of course by means of those who are capable of performing that service. He may enter on the farm to inspect his woods, or for the purpose of cutting them down, and disposing of them; or he may enter it to inspect the state of his farm. In all these cases, the landlord by himself, or those acting under him, must have access to the farm. But it has been questioned, whether this right can be extended to the case of hunting or of recreation.

This question had not until lately been determined by the Court: and although a great deal may be said in favour of the tenant's right to exclude even the landlord, and to protect his farm from the irreparable injury which may result from an unlimited exercise of this privilege on the part of the landlord, or of those having his permission; yet it has been held, that the landlord may hunt or pursue game over the farm of his tenant, leaving the tenant to seek redress, in case of injury, by an action of damages.*

* *Ronaldson v. Ballantyne*, 21st November 1804. *Mor.* p. 15270. In this case it was argued for the tenant, that an action of damages can afford no adequate remedy; as it would be impossible for the tenant to keep such a watch over his farm, as might enable him to bring the injury home to the party by whom it may have been committed. Neither can the tenant be supposed to be in circumstances to pursue an expensive action, while the fund from which he derives his support is materially injured by the evil of which he complains. The Court, however, seem to have been moved by the consideration, that the right of hunting has been immemorially

SECT. III.

OF THE HERITABLE NATURE OF THE LEASE.

IN stating the rights of parties as arising from the lease, the heritable nature of the right constituted by that deed enters into consideration, as affecting the rights both of landlord and tenant.

enjoyed by proprietors, without interruption from their tenants, who are not themselves qualified to exercise the right; and, that by granting a lease of the fruits merely, the landlord will not be held to have conferred on the tenant a power of interfering with the exercise of a right which the Legislature has vested exclusively in proprietors. Some weight may also have been given to the argument derived from the analogy of the landlord's implied power of digging for coal, lime, or other minerals, on indemnifying the tenant for surface damage. The Court decided unanimously in favour of the landlord's privilege, reserving to the tenant his claim for the damages he may be able to qualify. Mr. Hutcheson (Justice of Peace, B. IV. c. xii. § 4.) says, that in this case it seemed, however, to be the opinion of the Judges, that the tenant might prevent any one from entering fields prepared and sown for a wheat crop, the damage there being so evident and considerable.

In a more recent case, it rather appears to have been the opinion of the Court, that a tenant commits a trespass by pursuing or killing game, even on his own farm, without the landlord's permission. In this case, the tenant was not a qualified person; but even had he been so—if the right of hunting be a reserved power in the landlord, analogous to his right to mines and minerals, the Court would probably go the length of preventing even a qualified tenant from hunting or killing game on his own farm, without the landlord's consent. *Marquis of Tweeddale v. Somner*, 18th June 1808. *Reported in note in Fac. Coll. Earl of Hopetoun v. Wight*, 17th January 1810.

When the former editions of this work were published, the question as to the landlord's power of hunting over the tenant's farm had not been decided, and the argument for the tenant was pretty fully stated in the text. This seems now to be unnecessary; but the argument then stated will be found in the Appendix.

The lease, which at common law is a personal contract, has, under the statute,* the effect of an heritable right. By complying with the requisites of the act, the lease secures the possession of the tenant against the charter and sasine of a purchaser, or other singular successor. But is it in every sense to be held an heritable right?

In answering this question, there are two views to be taken of it, 1. As it refers to the purchaser of the estate; 2. As it refers to those acquiring right from the tenant. 1. In regard to the purchaser, his right to the lease or to the rents is not to be considered as standing solely on the assignation to the lease; he has a superior title as feudal proprietor of the lands. If, therefore, the former proprietor, by whom the lease was granted, had, by a separate deed, declared the rent payable by the tenant to be less than what is specified in the lease, there can be no doubt that a back-bond, containing such a declaration, would not affect the purchaser; not only because to this extent the lease is not to be considered as an heritable right, but also, because the purchaser's right to the possession of the lands stands on his feudal title, which is excluded by the tenant's lease merely by the force of a statute, which declares, that the rent stipulated in the lease shall be payable to the purchaser. If, then, a back-bond cannot affect the purchaser, a verbal bargain for an abatement of rent can never have that effect, even had the agreement been acted upon, and were it capable of being

* Act 1449, c. 18.

proved by the receipts of the landlord in the hands of the tenant. The question has been lately decided by the Court, but the cases are not reported.—2. In the case of the assignee to the lease, the same rule does not apply; his right will be affected by the deeds of the tenant. This arises from the difference in the nature of the two rights. The disponee, in the heritable right, rests on the faith of the records, and disregards all deeds granted by his author, which do not appear there: But the assignee, in a moveable right, can be in no better situation than the cedent: *utitur jure auctoris*, he has the right as it stood in the original creditor, and is affected by any back-bond he may previously have granted. This makes the question depend on the heritable or moveable nature of the lease; for, if it is held to be an heritable right, in a question of this kind, the assignee will not be affected by the back-bond of the cedent; whereas, if it is to be considered as a personal right, that back-bond will affect him in the same way that it would have affected the original tenant. There is a case which seems applicable to this point, and which shows, that in this view the lease is to be considered, as of its original personal nature.*

* Mrs. Forbes, 1st January 1668. Stair. Mor. p. 10204. Mrs. Forbes granted a tack, to endure for 19 years, at the same time that she took a back-bond from the tenant, obliging him to remove within that period, provided her debt to him should be paid off. The tenant, in this lease, sold his right; and the proprietor having pursued a count and reckoning and removing under the back-bond, the new tenant insisted, that the back-bond could not militate against him a singular successor, it neither being intimated to him, nor recorded before the date of his right; and the tack

CHAP. VI.

OF THE MEANS BY WHICH THE TENANT'S INTEREST IN THE LEASE IS TRANSFERRED.

WE formerly had occasion, in treating of the destination of the lease,* to consider the tenant's power over the lease; and therefore, without recurring to the question of power, we are at present to inquire by what forms the tenant assigns his right, or subsets the farm. These two subjects shall be treated separately.

SECT. I.

OF THE ASSIGNATION.

IN treating of the assignation, we shall consider; 1. The form of the assignation; 2. The manner of completing the assignation; and 3. The effects of the assignation, in reference, 1st, to the cedent; and 2^d, to the assignee.

being a real right, it can be affected to the prejudice of a singular successor by no act or deed of the original tenant. The Lords repelled the defence, in respect of the back-bond: thus giving effect to the back-bond against the singular successor.

* *Supra*, p. 118.

1. *The form of the assignation.*—By this deed, the tenant, for a valuable consideration, conveys his lease to the assignee, and the assignee becomes bound to fulfil all the conditions demandable by the landlord. This conveyance has a clause of warrandice from fact and deed.*

* *Assignation to a Lease.*

I, B, CONSIDERING that, by a tack, of date , granted by A to me, he SET, and in a tack and assedation LET to me, my heirs and assignees, ALL and WHOLE ; (here describe the subjects), and that for the space of years, from and after my entry thereto, which was thereby declared to have been at the term of ; For which causes, and, on the other part, I thereby bound and obliged myself, my heirs, executors, and successors, to content and pay to the said A, his heirs and assignees yearly, during the said lease, THE SUM OF £ STERLING, in name of TACK-DUTY, at two terms in the year, and , by equal portions, beginning the first term's payment thereof, at , and the next term's payment at thereafter, for crop , and so forth termly thereafter, during the currency of the said lease ; by which lease, I became bound in other conditions and obligations, as therein particularly expressed: AND FARTHER CONSIDERING, that C has made payment to me of the sum of £ sterling for my right in the said lease, of which sum I hereby grant the receipt; THEREFORE, I hereby SELL, ASSIGN, CONVEY, and MAKE OVER, to the said C, his heirs and assignees, my right and interest in the said tack, during the whole years thereof yet to run, with full power to the said C and his foresaids, whom I hereby SURROGATE and SUBSTITUTE, in my full right and place of the premises, to occupy and possess the said lands during the whole space foresaid, or to sublet the same as he or they shall think fit, and to receive and discharge the rents thereof, and to do every thing, which under the said lease I might have done before granting hereof; PROVIDING ALWAYS, as it is hereby expressly PROVIDED and DECLARED, that the said C and his foresaids shall be bound and obliged, as by acceptance hereof he binds and obliges himself, his heirs, executors, and successors whomsoever, to make payment to the said A and his foresaids, of the whole rents stipulated by the said lease, to be paid

It appears to be the best way of treating this part of the subject, to connect the observations on the assignation with the different clauses of which it consists; by which means, not only the nature of the form, but the changes that take place upon it, will be brought into view.

1. *The granter.*—The granter of the assignation must necessarily be possessed of power to grant a conveyance of the lease. If it be a 19 years' lease, the lease must be granted to the tenant and his assignees; if it be a lease for a longer period, or a life-rent, then, without any express mention of assignees, the tenant will be entitled to assign, unless assignees be excluded.* In de-

to him by me and my aforesaid, for the said lands; AND also, to implement the whole other obligations and conditions incumbent on me by the said tack, during the whole years and space thereof yet to run, at the times and in the precise terms therein specified: AND HAVING paid up all the rents due by me, and performed the whole obligations incumbent on me, previous to the said C's term of entry, I hereby BIND and OBLIGE me and my foresaid, to WARRANT to the said C and his foresaid, the assignation above written, from all facts and deeds, done or to be done by me, in prejudice hereof; and I have herewith delivered up to the said C an extract of the said tack, to be kept and used by him and his foresaid, as their own proper title in all time coming; AND I CONSENT to the REGISTRATION hereof in the books of Council and Session, or other Judge's books competent, therein to remain for preservation; and, if necessary, that all execution competent may follow on a decree, to be interposed hereto, in common form, and for that purpose, I CONSTITUTE

MY PROCURATORS, &c. IN WITNESS WHEREOF.

* *Vide Supra*, p. 143. In treating of the tenant's right to assign the lease, it was said, (*Supra*, p. 145, 146), that where assignees are excluded, "*except with the landlord's consent*," such a qualification deprives the landlord of an arbitrary power of rejecting an unexceptionable assignee. This doctrine seemed to be supported

cribing the cedent, nothing is said of his title to assign, because the narrative, in which the lease is recited, fully explains the cedent's power.

by the authorities referred to; and certainly an impression had prevailed very generally amongst conveyancers, that such was the construction which the Court would give to a clause so expressed. A contrary rule, however, has been very lately established by the First Division of the Court, in a case in which the question was fully argued and solemnly decided. The important correction required by this decision ought to have been made on page 147; but as that part of this volume had been printed before the date of the late decision, it may not appear altogether out of place to make the correction here. In the case referred to, a well-frequented tavern had been let for ten years to the lessee, "*excluding assignees and sub-tenants without the landlord's consent.*" About a year after the commencement of the lease, the lessee proposed to sublet the tavern; and the landlord, who seems to have been apprehensive that the character of the house would suffer by the change, objected to the proposed sub-tenant. The question came first before the Burgh Court of Glasgow; and after some investigation as to the authorities upon the point, the Magistrates, in deference to the cases of the Duke of Roxburgh *v.* Archibald, and Sir A. Ramsay *v.* Vallentine, decided against the landlord. The case came before the Court of Session by advocacy; and after hearing the question very fully pleaded, Lord Alloway, Ordinary, "In respect that an opinion has prevailed for some time in this country, founded upon the authority of the cases Duke of Roxburgh *v.* Archibald, 5th March 1785, (Mor. p. 10412.) and Sir Alexander Ramsay *v.* Vallentine, 29th June 1791, (*not reported, vide Supra*, p. 146), that when a lease excludes assignees and sub-tenants without consent of the landlord, this contemplation of consent so far alters the rights of parties, that the landlord must assign some reasonable cause for refusing his consent; and a great deal has now been stated to shake the authority of these decisions, as establishing that point: and the Second Division of the Court, in the case of M'Kenzie *v.* Learmont and Monro, *not reported*, has pronounced a decision directly contrary thereto, in order that this matter of such importance to the landlords and tenants of this country may be put to rest, makes avizandum with the case to the First Division of the Court," &c. The case came before the Court on informations, in which the general question was very

The granter may have acquired right as heir to the tenant; and, in that case, the question oc-

fully argued, a minute having been put in for the lessee, from which it appeared that the proposed sub-tenant had no intention of applying the premises to a different purpose from that for which they had been originally let. The Judges were unanimously of opinion, that the landlord might refuse his consent, without assigning any reason. *Lord Hermand* held, that there was no authority in our law for subjecting the exercise of the landlord's power, under such a clause, to the controul of a court of equity; and that the cases referred to in support of such a rule had no application. *Hepburn v. Burn* (*Supra*, p. 145,) was not a question with a stranger assignee; the lessee there merely put forward the succession to his eldest son; so that the landlord had no reason to complain of a stranger being forced upon him. *The Duke of Roxburgh v. Archibald*, gave no authority for the entry in the Dictionary, for the question decided in that case appears, on investigation, to have related to the fodder upon the farm, and not to the power of a landlord to refuse or admit an assignee; and *Sir Alexander Ramsay v. Vallentine* was decided on the specialty, that Sir Alexander, the landlord, had authorised the lease to be sold, and after doing so, had adjected conditions to his consent, which diminished its value. *Lord Balmuto* concurred generally with *Lord Hermand*. *Lord Balgray*, until he read these papers, had a general impression that the landlord, in a case like the present, was bound to exercise his right under the controul of the Court. It appeared, however, when investigated, that there was no authority for such an impression. The landlord, therefore, is not bound to assign a reason. *Lord President Hope*, Where assignees are excluded without the consent of the landlord, the landlord is not bound to assign any reason for refusing his consent. I never heard of the rule here maintained by the tenant, that the landlord is bound in such a case to exercise his discretion under the controul of a court of equity. There appears to be a mistake in reporting the *Duke of Roxburgh v. Archibalds*. With regard to *Vallentine v. Sir Alexander Ramsay*, I remember the case well. I was counsel for Vallentine's creditors. There Sir Alexander had agreed to the lease being exposed to public sale; and the night before the sale, he annexed certain conditions to his consent, which were read at the meeting when the lease was exposed; but they were so unfavourable that nobody would bid for it. Soon after this, Sir Alexander himself purchased the lease, and next day let the

curs, what kind of title is sufficient to enable the heir of the tenant to assign? As I have occasion afterwards* to consider this question at some length, it is unnecessary to say more here, than that the

firm at a considerable advance of rent. Sir Alexander Ramsay was a very respectable gentleman, but in that case had taken an erroneous view. His conduct nearly approached to fraud, and it was in that view that the Court decided the case. His Lordship seemed to think that there might be room for a distinction in interpreting clauses such as occurred here, between the case where the lease is to the tenant *excluding* assignees and sub-tenants *without the landlord's consent*, and that where the lease is to the tenant and his assignees and sub-tenants, *if consented to by the landlord*. In the former case, the exclusion being absolute, in so far as the tenant is concerned, the landlord can be subject to no controul. He may give a consent if he thinks proper, but is not bound to assign any reason when he withholds it. In the latter case, there may be room for a different construction; but although his Lordship thought that such a distinction might be taken, he did not go so far as to say that the latter mode of expressing the clause would have led to a different decision. As to the case of *M'Kenzie v. Learmont and Munro* in the Second Division, referred to in the Lord Ordinary's interlocutor, it was no decision upon the point. *Lord Succoth*, if the question had now occurred for the first time, he would have been inclined to agree with the opinions delivered; but when the reverse had been laid down in a book of authority, and when the interpretation there stated to have been sanctioned by the Court, has been repeated by a very high living authority in his Lectures, his Lordship had some doubts, on coming into Court, how far it might be proper to put a different construction upon the clause. The Court decided in favour of the landlord, and found him entitled to expenses. *Muir v. Wilson*, 20th January 1820, *not yet reported*.

The lease of an urban tenement, where the contrary is not expressed, carries with it the power of assigning or subsetting, provided the subject is not subset for a purpose different from its former use. *Anderson v. Alexander and Miller*, 10th July 1811: *Fac. Coll.* See also *Russel and Ackenhead v. Bennay*, 7th January 1748. *Elchies voce Tack*, No. 13. *Notes*, p. 444. *Kilk.* under names *Aitchison v. Binny, voce Tack*, No. V. *Mor.* p. 10405.

* *Infra*, chap. vii. § 3.

heir of the tenant may validly assign without a service, and grant the right in his character of heir alone.

2. *The narrative.*—In the narrative, there is nothing particularly deserving of attention, farther than that it must be accurate in the names of the parties, in the description of the lands, and in the date and period of endurance; an error in any of these particulars ought to be avoided, though there are so many circumstances to prove the identity of the right meant to be conveyed, that the errors must be very gross indeed, before they can be fatal to the conveyance. It is usual to specify the rent payable to the landlord, and to refer, in general, to the other obligations incumbent on the tenant: there can be no occasion for mentioning these more particularly, as the assignee is bound to undertake all the obligations in general, as contained in the lease, which is sufficient, without a precise recapitulation of them.

It is in this clause that the cause of granting is expressed; and it is now requisite, as in the clause in the foot note, that the precise amount of the consideration paid by the assignee should be specified.

3. *The dispositive clause.*—In this clause, the tenant makes over to the assignee, and his heirs and assignees, his right and interest in the remaining years of the lease. In the form in the foot note, a power is given to the assignee, not only to possess, but to subset; this must depend on the terms of the original lease, for unless there be a power given to the tenant to subset, as well as to

assign, no such power ought to be given to the assignee.

This right is given under the condition, that the assignee shall pay the rent to the landlord, and perform the whole obligations incumbent on the tenant by the lease. Here it is proper to inquire, whether this obligation come under by the assignee has the effect of relieving the principal tenant; that is, whether the tenant, like the vassal in the feu right, falls out of the transaction in consequence of having transferred his right to the new tenant; the new tenant, like the new vassal, coming precisely into the place of the original tenant, and thus relieving him of his obligations under the lease.

Lord Bankton and Mr. Erskine hold, that the principal tenant still remains bound.^a Lord Kilkerran, with reference to this question, says, "Some were of opinion that where the tack is to assignees, the tacksman, after assignation, is no more liable for the rent than a feuar is for the feu-duty after the sale of the lands. But the more general opinion was, that where a tack is to the tacksman and his assignees, the tacksman remains bound even after assignation, just as in every other contract, (for instance) a contract of victual, the assignation to that contract does not liberate the cedent."^b It is on the authority of this case, that Mr. Erskine^c

^a Bank. B. II. tit. ix. § 14. Ersk. Inst. B. II. tit. vi. § 34.

^b Grant v. Lord Braco, 21th February 1743. Kilk. p. 533. Mor. p. 15279.

^c Ersk. Inst. B. II. tit. vi. § 34.

says, that an assignee is, by his assignation, substituted in "place of the cedent, and so becomes obliged to fulfil all the articles which were laid on him by the lease, yet without extinguishing the obligation against the principal tacksman himself." But the question has not been considered as settled by these authorities; for more recently the Court considered the question to be attended with difficulty, and one upon which there was no precedent: The opinions of Lord Bankton and Mr. Erskine, (it was observed) who think the cedent still liable, being founded entirely on an observation incidentally made by the Court in the case of *Grant v. Lord Braco*, which was "decided on other grounds."

This, then, is to be held as an undecided point, nor can it be affected by any thing that may be stated in the assignation: it is a question between the landlord and tenant, and must either be left to the decision of the law, or provided for by a clause in the lease itself. How far that may be proper, in order to settle the matter, and to prevent the possibility of a law-suit, is a question for the parties to consider. If any clause were to be inserted, it is probable that the landlord would insist for the security both of cedent and assignee.

When the question shall occur unaffected by any special agreement, the analogy of the fol-

* *Low v. Knowles*, 5th July 1796. Mor. p. 13873. In this case the point was not determined. Lord President Campbell is understood to have been of opinion, that the assignation liberated the original tenant.

right must have much influence; while, on the other hand, the nature of the lease, and the obligations come under by the tenant, will no doubt be attended to. There is a distinction on this point, of which Lord Bankton takes notice. It is the case of an assignation by an assignee; and although he is of opinion, that the tenant assigning remains bound, yet in the case of a second assignation by the assignee, he thinks the first assignee will be relieved, on the right being completed in the person of the second assignee.*

4. *The Clause of Warrandice.*—This clause, in the form in the foot note, is introduced by a declaration that the cedent has paid up the rents, and performed all the obligations incumbent on the tenant, previous to the term of the assignee's entry. This is a point that never ought to be neglected by the assignee or his agent; he ought to see the discharges of the rent; and here it will be proper for him to observe, that it is not merely by the legal terms that he is to judge of the rent due, but by the crops, with reference to the terms at which the rents of the crops may be payable; and, therefore, the discharges to be produced to the assignee, will be the discharges of the rent of the crops reaped by the cedent, though they may be payable (as will sometimes happen) a twelvemonth after the period of the assignee's entry. Without attention to this, and by failing to connect clearly the rents and crops at the period of the

* Bank. B. II. tit. ix. § 14.

assignee's entry, the utmost confusion will ensue, and the assignee may suffer much injustice.

It will farther be proper, that the assignee should consider well the nature of the obligations incumbent on the tenant by the original lease; because, from the moment of his accepting of the assignation, he becomes liable to the landlord for their performance. The necessity of attending to these particulars will be very obvious, from the consideration that this obligation on the part of the assignee, will subject him in payment of all arrears of rent due at his entry.*

The warrantice of the assignation is from fact and deed only, that is, the cedent warrants the assignee, that he neither has done, nor shall do any thing to defeat the right he has given. By this obligation, the assignee, if he has completed his right, will be secured against the claims of the cedent's creditors, or voluntary assignees. In virtue of the assignation he has also right to the ori-

* *Ross v. Monteith, &c.* 5th February 1786. *Fac. Coll. Mor.* p. 15290. This case is thus shortly stated in the *Fac. Coll.*—"A tacksman of lands assigned his lease to certain persons, as trustees for his creditors. These trustees having entered into the possession, were sued for payment of the rents of two years antecedent to the assignment in their favour. The Lord Ordinary found, that by accepting the assignation, the defenders had subjected themselves to payment of the arrears of the rent then due. A reclaiming petition being presented to the Court, it was held to be perfectly clear, that those arrears were a burden inseparable from the right to the lease; and, therefore, the petition was refused without answers."

The same holds with regard to legal assignees under the bankrupt statute, against whom the landlord may enforce his right by a removing, under the Act of Sederunt 1756. *Nisbet & Company's Trustee, Petitioner*, 10th Dec. 1802. *Mor.* p. 15278, *vide Supra*, p. 306.

ginal lease, and to the clause of warrandice by the landlord therein contained, which in every case is a clause of absolute warrandice. The assignee, therefore, has the absolute warrandice of the landlord, and the warrandice from fact and deed of the cedent. These are the degrees of warrandice, which, independently of stipulation, the lease and the assignation bear; and if they are to be altered, it must be by agreement of the parties.

5. *Clause of Delivery.—Clause of Registration, and Testing Clause.*—No remark of any great importance occurs on these clauses.—The clause of registration is for preservation, and, if necessary, that execution may follow; though the clause of warrandice be the only clause of the deed on which diligence of any kind can follow: and were warrandice to be incurred, it would probably be by an action that the assignee would seek for redress.

2. *The form of completing the assignation.*—Our law has required that, as a check on fraudulent and private conveyances, every transference of property shall be accompanied by some outward visible act, indicative of the change. The property of moveables is transferred by possession—of heritage by infeftment.—The assignation to debts is completed by intimation—and the lease is perfected by possession.

Taking it as the general rule, that an assignation to a lease is completed by the assignee's obtaining the natural possession of the farm, we have to inquire how far it will apply to the different cases which may occur.—1. Where a tenant,

with power of assigning or subsetting, assigns his lease, the rule applies; for without possession, and while the tenant remains in the farm, the right of the first assignee may be defeated by a second assignee who obtains first possession, or by an adjudging creditor of the tenant. The right of the assignee, therefore, in this case, is completed only by his obtaining the natural possession of the farm. 2. Where again the principal tenant has first subset the farm, and then assigned his right, the assignee cannot in this case attain the natural possession of the farm—still, he may attain possession by drawing the rents payable by the sub-tenants, and this will complete his right as effectually as the natural possession of the farm in the former case.*—But several months may sometimes elapse before it is possible for the assignee to complete his right by actually drawing the rents, and it may often be necessary to complete the right without delay:^b where this is the case, the intimation of

* Sime's Trustee, Petitioner, 23d May 1806. Fac. Coll. Mor. Appendix *voce* Tack, No. 13. It was found in this case, that where a farm under lease had been subset, an assignation to the lease may be made to another, which will be effectual if the assignee uplift the surplus rent, leaving the sub-tenant to pay the principal rent to the landlord. It was observed on the Bench, that "there have been many questions as to the mode of completing assignations to a lease: But there can be none more effectual than possession. Here there is all the possession the case admits of—the possession of the sub-rents, which implies also intimation to the sub-tenants."

^b Wherever it can be done in cases where there is likely to be a competition, the possession should be proved by a payment and receipt to account, in the name of the assignee, however small it may be.

the right affords the natural and regular means of completing it. To whom, then, ought this intimation to be made? to the landlord or to the sub-tenant? And here it will be observed, that the intimation is considered as a solemnity; and it being the object of the conveyance to enable the assignee to draw the rent payable by the sub-tenant, it is to him the intimation should be made, and not to the landlord.* In *Hardie Douglas*' case

* *Hardie Douglas v. the Creditors of Hay*, 6th June 1794. Fac. Coll. Mor. p. 2802. In this case, Hay gave assignations of a sub-lease to *Hardie Douglas*, and to two other creditors, as a security for their debts, but none of the assignees entered into possession. On Hay's being made bankrupt, in terms of the act 1696, two of the assignees intimated their rights to the principal lessee; the third assignee also intimated his right soon after, but not until Hay had executed a voluntary trust-deed for behoef of his creditors. The trust-deed declared that the rights and preferences which the creditors had already obtained, should not be affected by it. The trustee sold the sub-lease. In a multiplepointing for dividing the price, the question occurred, whether those creditors, who had obtained assignations, had thereby secured a preference; and on this point, the other creditors maintained, that as the assignations had only been intimated to the principal tenant, they had never been properly completed.

The question did not turn on the effect of these assignations, because the trust-right which was in competition with them, preserved the preferences obtained; and, therefore, without any intimation, the assignations gave a preference to *Hardie Douglas*, and the others. But the Court, on this occasion, expressed the following opinion of such intimations:—" Possession is so far essential to the conveyance of a lease in security of debt, that, without it, the assignee has only a personal right; consequently a subsequent assignee or adjudger, getting first into possession, would be preferred. At the same time, were a process of adjudication to be brought, the assignee might insist to be put into possession before the right of the adjudger could be completed; and a summary application to the Judge Ordinary to that effect would be competent. The intimation in the present case had no effect in

a sub-tenant assigned his sub-lease, on which assignation no possession followed, though the conveyance was afterwards intimated to the principal tenant. The question came to be, what right was vested in these assignees?—The Court were not called upon to decide on the effect of the intimation, because all preferences had been preserved by a trust-deed agreed to by the creditors. But the Judges, in delivering their opinions, held, 1. That the assignation to a lease is completed by actual possession, or by an application to the Judge Ordinary to be put into the actual possession of the farm: 2. That when a principal tenant assigns a sub-lease, the assignation must be intimated to the sub-tenant, and not to the landlord; and 3. That where the right is given, not by the principal tenant, but by the sub-tenant, it can be completed only by actual possession. It was added, that in the mean time intimation of the conveyance by the sub-tenant may be made to the principal tenant, in order to publish the

“ completing the right. Where the principal lessee assigns his
 “ lease, the right of the assignee is completed by intimation to the
 “ sub-tenants, requiring them to pay their rents to him: where,
 “ again, the sub-tenant is the granter of the assignation, the right
 “ of the assignee can only be completed by actual possession of the
 “ subject, though, in the mean time, an intimation to the principal
 “ lessee may be proper, in order to render the transaction public.
 “ It is no objection to the intimation, that it took place after the
 “ bankruptcy of the cedent; that event does not prevent creditors
 “ from taking any step for their own safety, which can be done
 “ without the intervention of their debtor.” Fac. Coll. In giving
 his opinion in the late case of *Yeoman v. Elliot and Foster*,
infra, p. 353, Lord Balgray said, that this case of *Hardie Douglas* is
 incorrectly reported. His Lordship had been Counsel in the case.
 See Fac. Reports, 2d February 1813, p. 151.

conveyance. It is thus settled, that where the assignation is made by a principal tenant, who has previously sublet his farm, the assignation is to be completed by intimation to the sub-tenants.

4. Where again the assignation is made, not by the principal tenant, but by the sub-tenant, this is just a repetition of the case where the principal tenant assigns his right without having sublet his farm. The principal tenant in the one case, and the sub-tenant in the other, is in the natural possession of the farm; and where that happens, the assignation by either can be completed only by the assignee's acquiring the actual possession of the farm. This also is laid down in the opinions delivered in the case of *Hardie Douglas*.

These embrace the principal cases—The assignation by the principal tenant, where he is in the natural possession of the farm—the assignation where he has sublet his farm—and the assignation by the sub-tenant. But the observation made on the Bench in the case of *Hardie Douglas*, relative to the intimation of a conveyance by a sub-tenant, does not authorise us to conclude that an intimation of such a right to the landlord could complete the right and supply the want of actual possession.* The observation refers merely to the prudence of making such an intimation in order to give publicity to the right: but the question as to its legal effect was not before the Court. Such an intimation leaves the sub-tenant in the full possession of his rights in

* See below, foot note, p. 353.

the eye of the public; and where possession of the farm is required to complete the transference of the right, the effect produced by his retaining possession can never be defeated by an act so private as an intimation to the principal tenant.

Where, for example, a tenant assigns his right, and the assignee subsets the farm, the assignee's right, in the ordinary case, is beyond all question; his possession by a sub-tenant fully completes the right he received from the principal tenant: yet such is the effect that would be given by the Court to a transaction of this kind, where the original tenant was retained in possession without any outward mark to show the change in the nature of his right, that they would not support the right of the assignee.*

* *Wallace v. Campbell*, 16th November 1750. *Kilk. voce* Competition, No. 6. *Elchies voce* Tack, No. 17, Notes, p. 445. *Mor.* p. 2805 and 15280. In this case Campbell, vintner in Inverary, held a lease from the duke of Argyle of some tenements in Inverary for three 19 years; and, being indebted to several persons, he prevailed on his brother to become bound for his debts to the extent of £324, and to take an assignation to the lease for his payment. This was accordingly done; Campbell of Inverasragan, the brother, became bound for the debts, and took an assignation to the lease, and at the same time gave his brother a sub-lease for 11 years, at the rent of £12 Sterling. In this way the original tenant continued in possession of the subject, without any circumstance to prove the change that had taken place. In opposition to the right thus vested in Inverasragan, Wallace, an adjudging creditor of the brother's whose adjudication was a year posterior to the assignation, brought an action of mails and duties; when it came to be questioned whether this private assignation or the adjudication gave the preferable right to the lease. According to Lord Kilkerran's report;—"This transaction was considered as fully onerous, and the "project fair and generous on the part of Inverasragan, in order to "enable his brother to carry on his business; but the decision went "upon the abstract principle in law, whereof the adjudger was

The following passage from Kilkerran explains the principle:—"Transmissions of every subject must be completed by some public act that may come to the knowledge of third parties, and

"even in equity entitled to take advantage, his debtor having omitted to take in his debt in the list, though Inveraraigan may have been ignorant thereof. Transmissions of every subject of whatever kind must be completed by some public act that may come to the knowledge of third parties; and without which, the transmission will be incomplete, be it ever so fair and honestly intended. The transmission of the property of moveables is completed by delivery, of lands by infeftment, of *nomina* by intimation, of tacks and other rights which require no infeftment by possession; and, therefore, between two tacks, or between two assignations to a tack, or between two sub-tacks, it is the first possession that determines the preference. So far may be true, that in some cases, when a tack is assigned, the assignee cannot attain the natural possession: as, for example, when a proprietor assigns a tack whereof years are still to run; but, in that case, the civil possession, by uplifting the rents, comes in its place; or if such assignee shall be considered only as an assignee to the mails and duties during the currency of the tenant's tack, it must, as other assignations, be completed by intimation to the tenant. But in no case can a transmission be deemed complete where no act intervenes, other than what passes between the granter and receiver, and is known to nobody but themselves, which was the present case. And it was thought no good answer (which, for Inveraraigan, was chiefly insisted on), That as it was the very purpose of the disposition that he was not to have the natural possession, and that, consequently, he was in effect no other than an assignee to the mails and duties, at least during the currency of the sub-tack; so the sub-tack being to the granter himself who was in possession, there was no other to whom intimation could be made; and, therefore, either the transmission ought to be considered as complete, or it must be said, which none would say, that such sort of agreement, however in itself fair and honest, was reprobated in law; for still, as has been said, the civil possession was what completed the right, for as the remit to the Ordinary supposes payment might have been made of the duke's rent by the disponent, or he might have been enrolled as the tenant, which ought to have served for intimation." Kilk. p. 144.

“ without which the transmission will be incomplete, be it ever so fair and honestly intended.”^a The want, therefore, of a public act, is destructive to the right of the assignee: But we may be allowed to suppose that the intimation to the landlord would in this case have supplied what was deficient in the right of the assignee, since the Court sought for evidence of a payment having been made to the landlord in the name of the assignee, or for the entry of his name in the landlord’s rental book, which indicates an opinion, that the Court would have held a formal intimation to the landlord as a public act, sufficient to supply what was defective in the right of the assignee.^b

^a Kilk. p. 144.

^b This opinion has been confirmed in a late case, *Yeoman v. Elliot and Foster*, 2d February 1813. Fac. Coll. In this case, two long leases were assigned by the lessees to Elliot, in trust for Elliot and Foster, in security of advances. On receiving this assignation, the assignee had his name enrolled as tenant in the landlord’s rental book, and then granted sub-tacks to the lessees, who thus remained in possession. The lessees became bankrupt; and Elliot, in virtue of a power of sale contained in his assignation, had advertised the leases for sale, when he was interrupted by a suspension and interdict at the instance of Yeomen, the trustee on the lessee’s sequestrated estates. The trustee argued, that an entry in the landlord’s rental book was not a sufficient publication of the transfer of the property, and that the creditors had transacted with the bankrupts on the faith of their continued possession. *Lord Balgray* said, that to adopt the trustee’s argument, would be to overthrow the credit of the whole tenantry in the country. A lease is merely a personal right, the parties to which are the landlord and the tenant. This right is transferrable, like all other personal rights, by assignation; and the transference is completed by intimation to the only other person concerned, the landlord. How that intimation is made is of no consequence, if it be acknowledged that it was made. The assignation may be secret, known only to the parties to the transac-

Thus, in order to complete the assignation to the lease, it is necessary,

1. That the assignee, to the interest of the principal tenant, where the principal tenant is himself in possession of the farm, or to the interest of the sub-tenant, should have possession of the farm, in order to complete his right. An intimation to the landlord, or to the principal tenant (in case of an assignation by a sub-tenant) will not be effectual.
2. Where the tenant has sublet his farm, and then assigns his interest, (and it is the same thing where the landlord assigns the rents due to him), the assignee must be in possession by drawing the rents, or his right must be intimated to the tenant or sub-tenant by whom the rents are payable.
3. Where a tenant is desirous of assigning his lease, and at the same time of retaining pos-

tion; but this cannot be helped; it arises from the nature of the right. Even where there is a sub-tenant, he may pay his rent without any one knowing to whom, or who is in right of the lease. The case of *Hardie Douglas* is incorrectly reported. The Court concurred with Lord Balgray, and found that the right was sufficiently completed in the assignee. Mr. Bell, *Com. Vol. I. p. 86*, dissents from the doctrine of this case as being inconsistent with the true principles of law. "Intimation," he says, "is a completion of an assignation, only when it is made to a custodier of moveables, converting him thenceforward into a custodier for the assignee, or to a debtor, discharging the claim of the former creditor, and substituting the assignee in his place. So the assignation of a sub-lease is well completed by intimation to the sub-tenant, because it is truly only an assignation of rents, and the sub-tenant is the debtor. But there are no *termini habiles* for intimation to the landlord to the effect of transferring the right."

session, it is necessary for him to assign and receive a sub-lease from his assignee; but, in order to publish the transaction, an intimation of the right to the landlord will be required. In this way, the assignee will have possession by receiving the rents from his sub-tenant, and the objection of secrecy will in all probability be removed by the intimation to the landlord.

The assignation to the lease, thus completed, is capable of competing with other voluntary conveyances, or with legal diligence. 1. In competitions with voluntary conveyances, the priority of the possession, or of the intimation, must regulate the preference. 2. Competitions with the diligence of creditors may occur either with the adjudication or with the arrestment. 1. *Adjudication*.—Where an adjudication has been begun before the date of the assignation, litigiosity* will give the adjudication a preference over the assignation; where, again, the assignation has been granted before the summons of adjudication has been executed, the preference of the two rights will be regulated by the date of their completion.—The adjudication of a lease does not require sa-

* Litigiosity is intended to protect the diligence by which creditors propose to attach the heritage of their debtors, and is founded on the suspicion naturally entertained, that a debtor, to defeat the diligence of his creditors, may be tempted to divest himself before the diligence be completed; and, therefore, whenever the adjudication or inhibition is fully executed, litigiosity commences; after which, even a deed granted for a valuable consideration will not carry the subject from the creditor.

sine, and therefore the preference of the adjudication, and of the assignation, will depend upon the question, whether the possession following on the assignation, or the intimation of it, be prior or posterior to the date of the decree of adjudication. 2. *Arrestment*.—The arrestment is a diligence fitted to attach moveable debts only; it does not therefore carry any right to the lease, as it can be carried only by the adjudication; it merely attaches the rent due by the tenant: The assignation, therefore, can come in competition with the arrestment; only in the case of an assignation by the landlord of the rents due to him under the lease, or in the case of an assignation to a sub-lease; and, in these cases, the preference will depend on the priority of the arrestments, and of the intimation of the assignation.

SECT. II.

THE SUB-LEASE.

THIS is a deed, by which the tenant creates a new lease of his farm, by which transaction he becomes landlord to the person receiving the sub-lease. The circumstances under which a tenant can exercise this power, have been already stated, and the form of the deed (in the foot note) will explain the nature of the rights which it creates,

and will point out the resemblance which it bears to the principal lease.*

* SUB-LEASE.

It is contracted, agreed, and ended, between the parties following; viz. B, principal tacksman of the lands and others after mentioned; and having power under his lease to grant the following sub-lease, on the one part, and C on the other part, in manner following: that is to say, the said B, in consideration of the tack-duty, and other obligations come under by the said C, in manner after expressed, has subset, as he hereby, under the conditions and provisions following, subsets, and, in sub-tack and assedation, lets to the said C and his heirs, all and whole the farm of , and that for all the years and space of years, (being the years still to run of the tack, of the said lands, held by the said B,) from and after the said C's entry to the premises, which is hereby declared to be at the term of in the present year: But always with and under the several conditions and provisions contained in the said tack, entered into between the said B and A, of date , and recorded in the books of Council and Session : To which tack reference is hereby made, and of which an extract is herewith delivered up by the said B to the said C: And further, the said B assigns and transfers from him, his heirs and successors, to the said C and his foresaids, the whole stipulations and obligations conceived in favour of the tenant, as contained in the said original lease, in so far as they have not already implemented, in terms of the said lease; which sub-lease the said B binds and obliges him and his foresaids, to warrant to the said C and his foresaids, at all hands, and against all deadly, as law will; for which causes, and on the other part, the said C hereby binds and obliges himself, his heirs and executors whomsoever, to content and pay to the said B and his foresaids yearly, during the currency of this sub-tack, the sum of £ sterling, in name of rent or sub-tack duty; and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of , and the next term's payment at the term of thereafter, and that for crop and year , and so forth termly thereafter, during the currency of this sub-tack, with one-fifth more of each term's payment of liquidate penalty, in case of failure, and the lawful interest of the said rent, from the time the same falls due, during the not payment thereof: And further, the said C hereby accepts of the

The explanation, which has been already given of the terms of the lease, will render it unnecessary to say any thing on the terms of this deed; and it will be sufficient to mark those circumstances, in which the situation of the parties to the sub-lease either creates, or seems to create, a difference between their rights, and those enjoyed by the parties under the original lease.*

whole houses, farms, and inclosures, on the said farm, as in the same good order and condition as that in which they are to be left, in terms of the principal tack, at the expiration thereof; and he binds and obliges him and his foresaids to uphold the same in good order and condition, during the currency of this sub-tack, and to leave the same, at the expiration hereof, in the order required by the conditions of the said principal tack: *And further*, the said C binds and obliges himself and his foresaids, to implement, fulfil, and perform the whole other stipulations and obligations incumbent on the tenant by the said original tack, which are all here held as repeated, excepting the payment of the rent or tack-duty, due by the said B to the said A, for the said subjects; which rent is hereby declared to be payable by the said B and his aforesaid, out of the sub-tack duties hereby stipulated, to be paid by him by the said C: *And lastly*, both parties bind and oblige themselves and their foresaids, to implement and fulfil their respective parts of the said premises, each to the other, under the penalty of £ sterling, to be paid by the party failing to the party observing, or willing to observe the same, over and above performance; and they consent to the registration hereof in the books of Council and Session, or other Judges' books competent, that letters of horning on six days' charge, and all other execution necessary, may follow, on a decree to be interponed hereto, in common form, and thereto constitute

their procurators. In witness whereof, &c.

* It is proper to observe here, that it is impossible, by means of a sub-tenant, to alter or innovate the terms of the original lease. A lease was granted for three nineteen years, and "after the expiration of the third nineteen years, for the lifetime of the person then in possession." There was no prohibition against subletting, and the tenant in possession under this lease sublet the farm for a slump-sum; the sub-tenant coming precisely into the place of the

1. *The subject of the sub-lease.*—It was formerly the opinion, that a tenant, although empowered to sublet, was not at liberty to give out the whole of his possession on a sub-lease.* But this opin-

principal tenant, and paying his rent *directly* to the landlord. A short time after the expiration of the last term of nineteen years, the principal tenant, grantor of the sub-tack, died, and the landlord brought an action of removing against the sub-tenant, on the ground that the person entitled to the liferent under the original lease being dead, the lease was vacated. The sub-tenant pleaded that he was "*the person in possession*" at the expiration of the last nineteen years, and as such entitled to the liferent; for the sub-tack was virtually an assignation, as the sub-tenant took upon him all the prestations of the original lease, from which the principal tenant derived no profit except the price of the grant. The Lord Ordinary (Balgray) had found that the sub-tack "*does not alter or innovate the terms of the original lease, and that notwithstanding of the same, the civil possession of the said lands must be legally vested in John Wilson (the principal tenant), and the other heirs substituted to him: therefore finds that the liferent must be held to depend upon the life of the principal tenant in the civil possession at the expiry of the last nineteen years, and not of the sub-tenant.*" And the Court refused a petition against this interlocutor without answers. Ronaldson, Petitioner, 18th December 1812. Fac. Coll.

* In Kilkerran, p. 536, the following observation is subjoined to a case of competition, between an assignee and sub-tenant:—"Where a tack is not granted to the tacksman and his assignee, but, as in this case, to him, his heirs and sub-tenants, an assignation by him is void, and it is lawful for any other thereafter to take a sub-tack of a part of the subject, even while in the knowledge of the prior assignation; because, being different rights, the one void, the other valid, the knowledge of the prior void right does not infer any *participatio fraudis* in granting double rights. Nay, should even the master concur with the assignee, after the sub-tack is granted, the sub-tack will nevertheless remain effectual, in respect of the sub-tacksman's *jus quæsitum*. But, where a man has a tack to him and his sub-tenants, and gives a sub-tack of the whole subject, which was the fact in the present case, such sub-tack is no less void than an assignation would be, the

ion has been altered, and when the lease gives a power of subsetting, without restricting or limiting that power, the tenant may lawfully subset the whole of his farm; nor will it form an exception to this, that the lease, while it gives a power of subsetting, restrains the tenant from assigning."

2. The granter of the sub-lease acts in virtue of the powers conferred on him by the landlord; and, therefore, the right in the sub-tenant stands not merely on the faith of the principal tenant,

"difference between a tack bearing to assignees, and a tack bearing to sub-tenants, lying singly in this, that a tack to assignees may be wholly assigned; and a tack to sub-tenants imports only a power to subset a part; and, where the tenant subsets the whole, such subset is void; so that the assignation to the one, and the subset to the other, were equally void in this case, and as neither of them had a better right than the other, the nullity was only competent to the master, &c.; to whichever of the rights he gave his consent, it must prevail; and upon that ground, the assignee, to whose right the master consented, must at any rate have been preferred." See the report of the case, *Bowack v. Croll*, 22d June 1748. *Kilk. voce Tack*. Mor. p. 15280.

* *Crawford v. Maxwell*, 28th June 1758. *Fac. Coll. Mor.* p. 15307. In this case the tenant in a farm became bankrupt, and assigned his lease for the benefit of his creditors; and this assignation being contrary to the terms of his lease, which was given to him, "his heirs and sub-tenants, secluding his assignees," he then granted a sub-tack for behoof of his creditors. To this it was *inter alia* objected, that the contract of lease is strictly personal; and being founded on the confidence which the landlord has in the tenant, a power of subsetting can be intended only to enable the tenant to subset small portions of the farm, he himself remaining the effective tenant: But a total subset is equivalent to an assignation, which is here prohibited. The answer made to this was, that the power of subsetting is unlimited by the tack itself; and, therefore, cannot be restrained upon argument or implication. The Court sustained the sub-tack.

but also on the faith of the landlord. The landlord has given warrandice to the tenant, and has enabled him to sublet, and this entitles the principal tenant to transfer the warrandice of the landlord to the sub-tenant. Hence it follows, that the right of the sub-tenant, like that of the principal tenant, must stand or fall with the title of the landlord; and, on the other hand, the landlord's obligation to maintain the sub-tenant in possession is precisely the same as that under which he lies to the principal tenant. Farther, the right of the sub-tenant, standing on this foundation, and followed by possession, is a complete right in his person: and therefore it follows, 1. That where the landlord means to reduce the right of the tenant and sub-tenant, he must do it by calling the sub-tenant, as well as the principal tenant; for, were he to call the principal tenant only, then the right of the sub-tenant, standing on a new and separate title, the landlord, after reducing the title of the principal tenant, would have a new action to commence against the sub-tenant; nor would a collusive reduction, by which the principal tenant had permitted a decree in absence to go out, have any effect against the sub-tenant.* 2. No act of

* *Earl of Galloway v. M'Culloch*, 19th December 1626. *Durie. Mor. p. 7833*. In this case, the Earl of Galloway had obtained a reduction of the principal lease; and founding on that reduction, he brought a reduction of the sub-tack: But the Court, on the ground that the reduction of the principal tack had been in absence, and no good reason assigned, could not, from the mere circumstance of the principal lease being in this manner reduced, sustain a reduction of the sub-tack.

the principal tenant can affect the separate and complete right, which is vested in the sub-tenant, and secured by possession. Were the principal tenant, for example, to renounce his lease, that renunciation could in no shape affect the right of the sub-tenant; and the sub-lease would be effectual, notwithstanding such renunciation, until its stipulated expiration.*

3. The sub-lease must be followed by possession, in order to complete it. If, for example, a sub-tenant were to come in competition with an assignee, the preference would depend upon the possession; and the right with the first possession would be preferable. In like manner, were a sub-tenant to come in competition with the landlord, holding a renunciation from the principal tenant, the possession of the sub-tenant, and the date of the renunciation, would regulate the preference: or in the case of an adjudging creditor, the litigiousity arising from the execution of the adjudication, if prior to the date of the sub-lease, would carry the right to the adjudger: if posterior to the date of

* *Earl of Morton v. Tenants*, 14th and 29th July 1625. *Durie. Mor.* p. 15228. In this case, a sub-tenant had been several years in possession under a sub-lease, when the tenant renounced the principal lease in favour of the landlord, who brought a removing against the sub-tenant; and although the power to sublet was not very distinctly conferred, yet the Court sustained the sub-lease. By a decision, at the distance of a few days only, 28th July, between the same landlord and another tenant, where the sub-tenant had not been in possession under the sub-lease, the Court would not sustain it against the Earl, seeing it had not been intimated to him, and that he had no opportunity of knowing any thing of it at the time that he accepted of the renunciation from the principal tenant.

the sub-lease, then the priority of the possession, or of the date of the adjudication, would fix the preference. A case may be supposed, where intimation will be required to support the sub-lease: A person, for example, possesses under the principal tenant, without any regular sub-lease, from year to year, and at last obtains a sub-lease; the possession, which commenced on a separate title, prior to the date of the sub-lease, will not be effectual against a right in the landlord, arising from the renunciation of the principal tenant; in such a case, an intimation of the sub-lease to the landlord, will be necessary to protect the sub-tenant from the effect of the principal tenant's renunciation.*

4. The rent due by the sub-tenant is payable to the principal tenant; and when regularly paid at the terms of payment, the sub-tenant, and his crop and stocking, are relieved from any farther obligation. Where the rent is still due to the principal tenant, we have seen^b that the landlord will be preferred to the other creditors of the principal tenant: and when the sub-tenant has paid his rent, previous to the term of payment, he will be liable to the landlord or creditors of the principal tenant. It will be prudent, however, to take care, that the terms of payment of the rent in the principal lease and in the sub-lease should correspond; for were the sub-lease to stipulate fore-hand

* The doctrine here stated, is supported by the decision, the Earl of Morton v. Tenants, 14th July 1625. Mor. p. 15228.

^b *Supra*, p. 300.

rent, while the principal rent was paid back-hand, it might be questioned whether a fore-hand payment by the sub-tenant to the principal tenant, although made at the terms stipulated in the sub-lease, would, on failure of the principal tenant, protect the sub-tenant's crop and stocking from a claim at the landlord's instance; and although it is probable that, on the principle stated above, such payment would be effectual, yet it is fully as well to avoid the question.

5. Both Stair and Erskine hold, that the sub-tack does not give an active power to the sub-tenant, to the effect of enabling him to remove those in possession of the lands.* Whether this may not in part be remedied, by inserting a clause (where the power of removing possessors is required), empowering the sub-tenant to remove possessors in the name of the principal tenant, must be left to those acting for the parties to determine: But certainly the sub-lease will be a sufficient ground of action against the principal tenant; and through this medium the sub-tenant has a power of attaining possession.

* Ersk. B. II. tit. vi. § 34. and Stair, B. II. tit. viii. § 22.

CHAP. VII.

THE RULES OF SUCCESSION TO THE INTERESTS
OF LANDLORD AND TENANT IN THE LEASE,
WITH AN EXPLANATION OF THE NATURE
OF THE TITLE REQUIRED IN THE PERSON
OF THE HEIR OF THE TENANT.

THE interests in the lease, which are held by the landlord and tenant, descend on their deaths partly to their heirs in heritage, and partly to their heirs in moveables: It is therefore proper to attend to the circumstances by which their respective successions may be affected. In this view, it will be necessary to consider the rules of the landlord's succession, before proceeding to those of the tenant's.

SECT. I.

THE LANDLORD'S SUCCESSION.

IN our present view, it is the landlord's right, under the lease, that is, his right to the rents, which is properly the subject of inquiry; but, as

it may throw light on the succession of the tenant, it will be proper also to inquire into the interests of the heir and executor, where the proprietor is in the natural possession of the land.

1. *The rule of succession to the rents.*—The succession to the rents of an estate, on the death of the proprietor, is founded on a rule, which at first sight does not seem likely to create much difficulty; viz. that whatever part of the rents are due to the landlord before his death, belong to his executors; the residue, as never having been *in bonis* of the deceased, is to be accounted as part of the lands, and so passes to the heir.

If, in fixing on the terms at which the landlord, in this question, ought to be held as having right to the rents, the conventional terms of payment were taken, there could be no room for any question, whether the rent had belonged to the landlord, to the effect of transmitting it to his executors; since, wherever the proprietor survived the term, the rent would belong to the executors, and wherever he predeceased the term, it would transmit to the heir. But these conventional terms of payment are often regulated by circumstances little connected with the arrangement of the landlord's succession; and if we take the case, where the rent of the crop is payable at the Candlemas and Lammas after reaping the crop, he must have lived nearly a twelvemonth after the reaping of the crop before he can transmit the rent to his executors. The irregularities in the succession, which would necessarily follow from taking the conventional terms as a rule, seem to be avoid-

ed by taking, in place of them, the legal terms of payment; and accordingly they have been resorted to as the standard.

This is extremely well explained by Lord Kaims. He says, " In clearing the respective interests of heir and executor, with regard to the rents of lands, unuplifted by the defunct, the natural rule is, that nothing can belong to the executor but the rent of that term which was past before the predecessor's death, and which term's rent came thereby to be *in ejus bonis*; and as of old our rents in Scotland were generally paid, the one-half at Whitsunday, the other half at Martinmas, for that year's crop, hence these came to be understood as the fixed terms by which all questions were determined betwixt the heir and executor; without regard to the many various conventional terms which afterwards came to be in use amongst us; which conventional terms were understood to be merely for the benefit of the master or tenant, as the payment of the rent was advanced or postponed: and so in questions betwixt the heir and executor, these conventional terms were quite overlooked, and the rule continues to be the same as originally."

The rule, as explained by Lord Kaims, is perfectly fixed and established. Where the landlord survives Whitsunday, he has right to the first half-year's rent of that crop; where he survives Martinmas, he has right to the whole year's rent. But simple as this rule may seem, it will often

* Folio Dict. Vol. II. p. 452. See also Elucidations, Art. 9.

be found difficult in practice to connect the rent and the crop; and this difficulty is increased, by the explanation of the rule as given by Mr. Erskine.

“ Custom (Mr. Erskine says) has fixed on two terms in the year, as the periods from which the rents of that year are to be accounted. *in bonis* of the liferenter. The one half at Whitsunday, *when the corns are presumed to be fully sown*, and the other half at Martinmas, *when they are reaped*. If the liferenter survive Whitsunday, he has, by this rule, a right constituted to himself, and therefore descendible to his executors, in the half of the rent payable for that year, because that half was due before his death; the other half, the term of which was only current at his death, and which, for that reason, had not become his property, falls to the fiar. If he survive the term of Martinmas, his executors have, on the same footing, a right to the whole of that year's rent. Those legal terms of the payment of rent are the rule for determining such cases, though the conventional terms should be made later than the legal.” Such is the explanation given by Mr. Erskine; and he adds, that the rule applies equally to the case where a proprietor dies, and to the case of a liferenter. In the cases which it will be proper to consider, in forming an opinion on this point, we shall see how far they have been affected by this explanation.

* Ersk. Inst. B. II. tit. ix. § 64.

In the case of a corn farm there can be no dispute wherever the rent and crop are connected; but in a grass farm, it may be said that, following out the principle of the rule which makes the whole year's rent of a corn farm vest in the landlord at Martinmas, because at that term the crop has been reaped, it cannot vest in the case of a grass farm till the expiration of the year, because the tenant is constantly, during the whole of the period, enjoying the benefit of the grass crop. This argument was strongly urged, in a case where the tenant had entered to a grass farm at Whitsunday, the first half year's rent of which was payable at Martinmas, and the other half at the Whitsunday following. The landlord died in January, and the question occurred, whether the half year's rent due at Whitsunday fell under his executry. According to the simple rule, as he had survived Martinmas, he was therefore entitled to the whole year's rent, although the last half was not due till the Whitsunday following his death. But taking Mr. Erskine's explanation, the tenant could not be said to have reaped the crop corresponding to the last half year's rent till the Whitsunday; and the landlord having died before that term, the last half year's rent did not fall under his executry. The executors did not found on the rule as depending on expediency, independently of the reaping of the crop; but they insisted that the crop of a grass farm was all reaped previous to Martinmas, and, therefore, that there could be no exception on that account from the common rule.

The Court found that the rents in dispute fell under the defunct's executry.*

In the next case, a tenant had entered to a grass farm at Whitsunday; the landlord died in April following; and the question was, whether his executors were entitled to the whole of the rent of the year, the last half year's rent of which was not payable until the term of Whitsunday immediately after the death of the proprietor. The heir, in claiming the half of that year's rent, admitted, that, in a corn farm, the whole must have gone to the executor; but argued that this arose from the consideration, that at the Whitsunday the whole crop is presumed to be sown, and that at Martinmas it is presumed to have been reaped; and also to the consideration, that the entry to a corn farm was always at the Martinmas preceding; so that the first half year's rent was due at the Whitsunday when the crop was sown, which is therefore considered to be the first term, and Martinmas the last. But in grass farms, the entry is at Whitsunday, and, consequently, Martinmas must be considered as the first legal term, and the Whitsunday following as the last: whereas, were Whitsunday to be held as the first term, in the same way as in a corn farm, then half a year's rent must be supposed to be due by the tenant at or even before his actual entry. In corn farms, the whole benefit is drawn before Martinmas: in grass farms, a continual profit arises from

* Sir William Johnston v. the Marquis of Annandale, February 1727. Dict. Vol. II. p. 453. Mor. p. 15913.

Whitsunday to Whitsunday; and, therefore, on the same principle on which Whitsunday and Martinmas are made the legal terms in corn farms, Martinmas and Whitsunday ought to be the legal terms in grass farms. The Court, on account of the practice, found, that the defunct having survived Martinmas, his executor had right to the whole crop, and therefore to the rent payable at the Whitsunday thereafter.*

Two points seem to be fixed by these decisions; 1. That in a corn farm, when the landlord survives Whitsunday, the first half year's rent of that crop is moveable: 2. That the same thing happens in a grass farm, to which the tenant enters at Whitsunday, and the rent of which is payable at the Martinmas next and the Whitsunday following: not on the principle, that in both cases the benefit to be derived by the tenant has been received by him before Martinmas; but on this ground, equally applicable to both, that the practice of the country has so fixed the point.

In another very important case, the tenants on an estate entered to their farms at Whitsunday, paid their whole year's rent at Martinmas, and did not reap a crop till the second year of their possession. The proprietors of this estate, father and son, died, the one in June, the other in August; and the next heir having drawn the rent due at Martinmas following, the deceased heir's

* *Pringle v. Pringle*, 4th June 1741. (Clk. Hume, No. 165, and Kilkerran, under the title, Terms of Payment, Legal and Conventional, No. 3.) Mor. p. 6419 and 15907.

executors insisted that they had a right to the half of the rent received by the new proprietor at Martinmas. The new proprietor did not dispute the right of the executors to the half of the rent of that crop; but he contended, that the rent of the crop was payable at Martinmas preceding; and as that had been drawn by the proprietor during his life, he could not be forced to pay that rent a second time to the executors. On this question the Court were much divided; all agreed in the rule that Whitsunday and Martinmas are the legal terms of the year; that the legal and not the conventional terms regulate the question; and that, therefore, when the predecessor survives Whitsunday, the executor has right to the half, and where he survives Martinmas, to the whole of the year's rent due for that year; but they differed in the application of them.

This case was not decided, a proof having been ordered, to discover whether the farms were corn or grass farms, and the rents fore-hand or back-hand rent; but the argument is so ably stated, and gives so full a view of both sides of the question, that it is subjoined in the foot note.*

* *Campbells v. Campbell*, 11th June 1745. *Kilk.* "Terms of Payment, Legal and Conventional," No. 5. *Mor.* p. 15908. "It was on the one hand said, that in order to a just application of these rules, a distinction was to be made betwixt grass-rooms and corn-rooms, because it is from the subject or produce of the ground, on account whereof the rent is paid, that we know what the year is for which the rent is paid; for the rent follows the subject, and in grass-rooms and corn-rooms the subject for which the rent is paid is very different. In grass-rooms, the subject for which the year's rent is paid by the tenant entering at Whitsunday, is the produce of the summer and harvest imme-

There is another case, where the tenants on an estate, which consisted of grass farms, entered in-

"diately following his entry, such as the wool, butter, cheese, lambs, hay, &c. In corn-rooms, again, the year's rent is paid for the corn-crop; and, therefore, where a tenant enters at Whitsunday, while the outgoing tenant's crop is upon the ground, he gets not the subject for which his first year's rent is paid till the second harvest after his entry.

"In both cases, the valuable produce of the ground is reaped in the space of one-half year, and the rent is understood to be paid for that half year which produces the valuable profits; and therefore, as in grass-rooms, the tenant gets *per advance*, the first summer after his entry, the chief product of the ground, and for which his first year's rent is supposed to be paid; it follows, that the heritor dying in June or August after the Whitsunday at which the tenant entered, the executor has right to one-half of the year's rent, whether by the tack the whole be payable at Martinmas, or, which is more usual, the one-half at Martinmas, the other at the Whitsunday following, because it is payable for the subject produced the first half year; whereas, in corn-rooms, as the tenant entering at Whitsunday gets not the valuable produce of the ground for which his first year's rent is paid till the second harvest after his entry, it follows, for the like reason, that the heritor dying in June or August, or, which is all one, on the 16th May immediately following the tenant's entry, the executor can have no right to any part of the first year's rent payable by the intrant tenant; and that whether his rent be fore-mailed or after-mailed, because he does not pay it for that year in which the heritor died, but for the year following in which he reaps his first crop; and the half year falling to the executor, is the half of the year's rent due by the outgoing tenant who reaps his crop in the harvest after his removal; and which crop, joined with the grass which he got *per advance*, the first summer after his entry, is the subject for which the rent for the last half-year of his tack is paid.

"That, however, there is this difference between the case where a corn farm is after-mailed, as most usually it is, and where it is fore-mailed. That where it is after-mailed, the case as to his rent becomes just the same after the lapse of the first year after the tenant's entry as it is in grass-rooms; for the heritor dying on the 16th May of the next year after the tenant's entry, as his

to possession at Whitsunday, and were bound, by their tacks, " to pay a half year's rent at the

" year's rent is paid for the crop reaped the harvest thereafter, the
 " executor is entitled to the one-half of it, and so of all subsequent
 " years. But if in a corn farm the rent be fore-mailed, that is
 " payable, as in the present case, the first Martinmas after his entry,
 " as it is truly paid for the crop of the subsequent year, the heritor
 " dying on the 16th May, whether of the first or any future year
 " of the tenant's possession, the executor can have no claim to any
 " part of the rent payable by him at the Martinmas thereafter, be-
 " cause it is payable, not for that year, but for the crops of the sub-
 " sequent year, to which the executor has no right. Though it is
 " nevertheless true, that still the executor has right to a half year's
 " rent; but that will be the half year of the rent payable at the
 " Martinmas before the heritor's death; and if that has been up-
 " lifted by the heritor himself, his executor cannot demand it over
 " again. And, from all this, they concluded with a motion for a
 " proof for clearing these facts, whether the farms on the estate
 " were grass-rooms or corn-rooms; and, as there were no tacks,
 " whether they were fore-mailed or after-mailed.

" It was on the other hand said, that the rule was general, and
 " had been uniformly followed for these 100 years and more, that
 " where the heritor dies after Whitsunday, the executor has right
 " to the one-half of the year's rent, payable in the year in which
 " the heritor dies, and to the whole of it when he survives the
 " Martinmas, and *that* without distinction whether the farms were
 " corn-rooms or grass-rooms, or whether the rent was fore-mailed
 " or after-mailed; and for this, an appeal was made to certain de-
 " cisions observed by Durie, particularly to one wherein mills,
 " though the rents thereof are produced from crops, and the rent
 " was fore-mailed, the heritor dying after Whitsunday, and before
 " Martinmas, the executor was found to have right to the half;
 " where he survived Martinmas, to the whole of the rent payable
 " in that year. *The Laird of Westnisbet v. Swinton*, 21st February
 " 1635. Mor. p. 15683. It was urged, that it would be attended
 " with great inconveniencies to lay down any other rule, as it would
 " often be very difficult to determine what was a corn-room, and
 " what a grass-room, especially in farms lying between muir and
 " dale, where there was part grass, part corn, from which the
 " tenant made his rent; and that, farther, great difficulties would
 " occur in the case of liferenters and heirs of entail: a liferenter

“ Martinmas after their entry, *for the half year*
 “ *immediately preceding*, and another half year’s
 “ rent at the following Whitsunday, *for the half*

“ has right to the first term after the *fiar’s* death; but, according
 “ to the above doctrine, the rent due at the first term after the
 “ *fiar’s* death may have been uplifted by the *fiar* in his own time;
 “ whereby the first term she could get would be the rent payable
 “ the following year: her executors, also, at her death, would be
 “ deprived of the rent falling due in that year in which she died;
 “ and the like inconveniencies would happen in the case of heirs of
 “ entail.

“ To the first, it was replied, That, in the case of mills, the de-
 “ cision was just, because these were in the same state with grass-
 “ rooms, the mill rent being paid for the multure of the grain that
 “ is reaped the very harvest immediately following the miller’s
 “ entry.

“ To the second, That, 1st, wherever it is a doubt, whether a farm
 “ is a corn-room or a grass-room, the presumption is for its being a
 “ corn-room; corn being the ordinary and presumed product of
 “ the ground, though, in fact, none of the rent should be payable
 “ in victual, which frequently is the case even of corn-rooms, where
 “ victual has formerly been paid; which being rentalled, the farm
 “ comes in a course of time to be set as for a money rent. 2d,
 “ Wherever any victual, however little, is paid, that determines the
 “ farm to be a corn-room, as no victual is ever paid for a grass-
 “ room.

“ To the third, it was replied, That, where there is a standing in-
 “ feftment in liferent, it is not in the power of the *fiar* to fore-mail
 “ a corn-room, to the disappointment of the liferenter, at her entry,
 “ or her executors after her death; and should the *fiar*, in his
 “ own time, uplift the term’s rent to which the liferenter would
 “ have been entitled had it remained in the tenant’s hands, the ten-
 “ ant would, in strict law, be obliged to pay it over again. And,
 “ as to the case of heirs of entail, that it was a consideration of no
 “ consequence, though, even in that case, in strict law, the tenant
 “ in tail cannot fore-mail a corn farm to the disappointment of the
 “ next heir of entail.

“ The Lords, before answer (that is, without determining on
 “ the relevancy), allowed a proof, whether the rooms of the estate
 “ were corn-rooms or grass-rooms; and, if corn-rooms, whether
 “ they were fore-mailed or after-mailed.

"year preceding that term." The proprietor died on the 20th June, and his trustees, to whom he had conveyed his moveable property, claimed the half year's rent payable at Martinmas following. This being the case of grass farms, there were two points; 1. Whether in every case of a grass farm, the rent of the crop goes to the executor of the landlord, only where he has lived to the last day of the term, the produce of the grass farm continuing to be drawn to the very last. 2. That in this case there was a specialty, which necessarily decided the point against the claim of the executors; for the leases expressly bore, that the rent was for the half year preceding the respective terms of payment; and, therefore, these rents could not be *in bonis* of the landlord, unless he had survived the term of payment. The Lord Ordinary had sustained the defences, (that is, found that the rents due at Martinmas did not go to the executors), both on the general point, "and on the special terms of the tacks of the grass farm in question." But this judgment was altered by the Court, and it was "Found, that the half-year's rent, payable at Martinmas 1791, belonged to the trustees."

The majority of the Judges, in deciding this case, were clearly of opinion that the landlord, by surviving Whitsunday, transmits to his executor the half-year's rent of the crop of that year in which he died; and this precisely corresponds with the de-

* Trustees of Sir Francis Elliot v. Sir William Elliot, 28th November 1792. Mor. p. 15917.

cision in the case of Pringle,^a where, induced by the practice of the country, the Court found, that, in a grass farm, the proprietor having survived Martinmas, his executors had right to the whole year's rent of that crop; thereby fixing, that it was not requisite that the proprietor should live down to the expiration of the term, in order to vest in him a right to the rent.^b

From a review of these cases, and of the arguments on which they have been decided, we are entitled to hold it as fixed, that Whitsunday and Martinmas are the legal terms by which the landlord's succession is to be regulated; that this holds equally in grass and in corn farms; and, although the tenant in a grass farm has not reaped the whole of his crop at Martinmas, in the same

^a *Supra*, p. 371.

^b It was observed in this case, that a proprietor, by anticipating the term of payment, might affect his succession; but the postponing of the term could have no effect. Thus, for instance, a tenant enters at Whitsunday to the houses and grass grounds, and to the arable lands at Martinmas, and the rent is payable at Martinmas and Whitsunday; the tenant will be due a year's rent before he reap a crop, and the rent will be held to be the rent of the year in which he does reap a crop. The consequence of this is, that the rent of any one crop, in the course of the lease, is payable at the Martinmas and Whitsunday, before the crop is reaped, or even sown. Now, were a landlord to die between Whitsunday and Martinmas, his executors, in place of the half, would have a right to the whole rent of the crop, in so far as it was unpaid, in consequence of the anticipation of the terms of payment; for, wherever the rent is payable at the death of the proprietor, it will fall to the executors: so that, by this anticipation, the interest of the heir may be affected: by postponing the terms of payment, no other effect is produced than that of leaving the rights of the parties to be regulated by the legal terms of Whitsunday and Martinmas.

way that the tenant in a corn farm has done, yet, that from practice and expediency, the same rule will be applied to both; and if the proprietor survive Martinmas, his executors will, in either case, be entitled to the whole rent of that year's crop.*

* The rule here stated has been confirmed by recent decisions. In *Swinton v. Gawler*, 20th June 1809, *Fac. Coll.* the general question was argued, and the Court expressed a decided opinion, that in grass farms, let annually from April to December, if the proprietor survive Whitsunday, and die before Martinmas, the rent is divided between the heir and executor. In this case, bills had been taken for the rent of the grass, payable in one sum at Martinmas. It was argued, that the rent was due for the period from April to December, being only a *part* of the year; and that as the former proprietor lived till the 22d of October, the heir was kept out of possession for little more than one month. But the Court held, that it was for the crop, and not for the period of possession, that the rent was due, and that the rent, therefore, must suffer the ordinary division. They saw no reason for distinguishing the rents in question from those of farms let in the ordinary way. In this case, however, a specialty rendered it unnecessary for the Court to decide the general question; but the reporter says, that the Judges expressed so clear an opinion on the point, that he thought it proper to state it. See also upon this point the case of the *Marquis of Queensberry v. the Executors of the late Duke*, 18th February 1814. *Fac. Coll.*

Mr. Bell (*Commentaries*, Vol. II. p. 50, 3d Edit.) says, that he "has not yet found it settled by any authority or precedent, whether the same rule holds in the rents of houses with that which prevails respecting lands." But the Court has very lately decided that point also, in a case where the question arose as to house rents, between the heir and executor of a proprietor who had died between Whitsunday and Martinmas. The term of entry to the houses was Whitsunday, so that the first half-year's rent was not payable until Martinmas; and it was strongly argued for the heir, that there was no room for the application of the principle which regulates the division in corn farms, and that the rents, according to the doctrine of Mr. Erskine, as never having been *in bonis* of the defunct, must still be held as part of the lands. The argument for the executor was rested chiefly upon the analogy of grass farms, and upon the expediency of having a uniform rule absolutely fixed for the

If this be so, the question, whether the farm be a corn farm or a grass farm, and whether the tenant has reaped all the advantages of that year, before Martinmas, or not, is at an end; and the only point to be ascertained in such questions is, at what terms the rent of the crop of that year, in which the landlord died, is payable: for these being ascertained, the first half of that year's rent will be moveable, where the landlord survives Whitsunday, although he should die the next day; and the whole of the year's rent will be moveable, where the landlord survives Martinmas.

In saying that the question, whether the farm be a grass or a corn farm, is settled, all that is meant is, that this inquiry is now unnecessary for ascertaining the period of the rents vesting in the executor, the two species of farms being, in this respect, put on a footing of equality. But the question may still be of use for connecting the crop and rent; the crop of a grass farm, for example, begins to be enjoyed from the moment of the tenant's entry, and therefore the year and crop is the same, and the first rent is the rent of

division of rents between heir and executor. The Court seemed to think, that there was no good ground of distinction between house rents and the rents of grass farms; and they decided unanimously against the heir's claim for the house rents due at Martinmas after the proprietor's death. The question was brought into Court by a suspension and interdict, at the instance of the heir, for prohibiting the executor from uplifting the Martinmas rents. The bill of suspension was refused by the Lord Ordinary on the bills, (Lord Balgray); and the Court (First Division), on advising a petition against the Lord Ordinary's interlocutor, with answers, unanimously refused the petition. *Binny v. Binny*, February 1820. *Not yet reported.*

the first year's possession. But this is not the case in a corn farm; the tenant must have possession for some time previous to his sowing the crop, in order to prepare the ground for it; and, therefore, the first crop may not be reaped in the corn farm during the course of the first year's possession; there the crop and year do not agree, and the first rent may be the rent, not of the first year's possession, but of the first crop, which is not reaped till the second year's possession. To explain this, let it be supposed that a tenant enters to a grass farm at Whitsunday 1800; against Whitsunday 1801 he has enjoyed one year's crop of that farm, and the first rent that he pays is the rent of crop 1800; of course, if the landlord dies between Whitsunday and Martinmas 1800, one half of that year's rent will be executry, the other half will go to the heir; and the only thing that can possibly alter this, will be the fore-mailing of the farm, (if such a thing can be supposed to happen). Thus, were the rent of that farm made payable at Whitsunday 1800, the day of the tenant's entry, then, no doubt, the right of the heir would be affected; for by this anticipation of the terms of payment, the whole rent would be due at the death of the landlord, and consequently would belong to his executors, since whatever debts can be instantly demanded, at the time of a person's death, form part of his executry. Again, if we suppose the case of a corn farm, that the tenant enters to the houses and grass grounds at Whitsunday 1800, and to the arable land at the Martinmas following, it is obvious that the first crop he reaps will be crop 1801, and therefore his first

rent will be due for that crop; and where it is made payable at Martinmas 1800, and Whitsunday 1801, it is as much an anticipation of the crop as in the other case, where, in the grass farm, we suppose the rent to be paid on the day of the tenant's entry. The consequence of this is, that, should the landlord die between Whitsunday and Martinmas 1800, his executors could draw nothing under the new lease, because the first crop is the crop 1801. Here, then, is a distinction between the first year's rent of the corn and grass farms; but it will be observed, that, although in this last case the executors would have no title to claim any part of the rent under the new lease, they would claim a year's rent from the outgoing tenant, and would be entitled to it, in so far as it was unpaid; for the last rent, paid by the outgoing tenant, would be the rent of crop 1800, and would be due at Martinmas 1799, and Whitsunday 1800.

If, again, we take the subsequent years of these two leases, they would come very nearly to the same thing: for as the rent of each crop is due at Whitsunday, the landlord, who in either case survived Whitsunday, would be entitled to the whole year's rent, because at the time of his death it was all due by the tenant; the only difference would happen, where the landlord in a corn farm survived Martinmas, for there, in consequence of surviving the term of payment, he would have a right to the first half of the crop of the ensuing year.*

* See as to the anticipation of rents, *Marquis of Queensberry v. the Executors of the late Duke*, 18th Feb. 1814. *Fac. Coll.*; where

In the cases which have been supposed, the common rule has not been admitted, owing to the circumstance of the rents having been due at the death of the landlord, and this arises from anticipating the term of payment; but where the rent is not anticipated, the rule will be applied, and the succession of the landlord will be regulated, by his having survived or predeceased the legal terms.

Thus, if we suppose the rent of the grass farm, which is entered to at Whitsunday, to be due at Martinmas 1800, and Whitsunday 1801, and of the corn farm at the same terms, the former will be the rent of crop 1800, the latter of crop 1801: now, taking these two leases at any subsequent year of their course, and supposing the landlord to die between Whitsunday and Martinmas, then his executors will have right to the first half year's rent of the crop in the grass farm, due at Martinmas; in the corn farm, to the whole year's rent due at Whitsunday; because the year's rent has been anticipated, the last half of it being payable at that term.

In deciding, therefore, any question that can arise on this point, we must, in the first place, connect the crop and rent; which is to be done only by an examination of the lease (or the possession of the tenant), and comparing the first rent paid with the first crop reaped; and in this

the question, as to an heir of entail's right to anticipate rents is considered, and the anticipation allowed in respect of the practice of the particular estate.

view, the nature of the farm must be considered: Having ascertained this point, we then see whether the rent be fore-mailed or after-mailed; where it is fore-mailed, the right of succession will be regulated by the conventional terms of payment; where it is after-mailed, the succession will be regulated by the legal terms of Whitsunday and Martinmas.

2. *The rule of succession, where the lands are in the natural possession of the landlord.*—There is a distinction, which has been long acknowledged in the law of this country, between the case where a proprietor is in the natural possession of lands at the time of his death, and that where his lands are possessed by tenants. In the preceding section, the case of lands let in lease has been considered; and we have now to attend to the other case, where the lands were in the natural possession of the proprietor at the time of his death.

The general rule in such a case is, that the heir instantly enters to the possession; and the only exception to this rule arises from the circumstance of part of the crop having been sown before the death of the former proprietor, for there his executors have a right to reap the sown crop. The difference which is observed between those crops, which grow without the necessity of annual culture, as grass, or the fruit of an orchard, and those which require annual seed and labour, as corn, arises from this, that the seed and labour, which the latter require, are held to have been bestowed by the proprietor for his own imme-

diate use and profit, and on this presumption, are transmitted to his executors; while the other, being more dependent on the unassisted nature of the soil, have been thought to belong more properly to the heir.

This point was early fixed in the opinions of our lawyers, and we find it affecting not only questions relative to the succession of the proprietor, but also the competitions which arose amongst the donators of the escheat. In the case, for example, of gifts, which gave a right to the personal estate as it stood at a particular time, we find the Court deciding, that the gift could only extend to the Whitsunday term before the gift, and not to the Martinmas after the gift. "But they found that the farms of the rebel's own labouring pertained to the donator, by virtue of that same gift; and albeit the gift was given in August, yet that it extended to the whole farms of that crop, which were in the rebel's hand in marsing, even as if he had died in August, not being rebel, the same would have pertained to his executors." In this decision the distinction is drawn between the case of lands in the possession of tenants, and lands in the natural possession of the proprietor: in the former case, the interest of the donator was regulated by the legal terms of Whitsunday and Martinmas; in the latter, by the date of the gift, which vested from that moment a right to the crops.

* *Somervell v. Stirling*, 2d Feb. 1627. *Durie. Mor. p. 5074.*

The point, as depending on the death of the proprietor, was fixed by several early decisions,* and more lately, in a case where a liferentrix was in the natural possession of lands at the time of her death, the affairs of the proprietor were in disorder, and the factor, for his creditors, did not dispute that the executors of the liferentrix had a right to the sown crop of that year, but he insisted that a rent should be paid for the lands on which the crop grew. The Lord Ordinary "found, that the executors of the lady had right "to the whole crop on the grounds of the lands, "which were in her natural possession at her "death, but that for said crop the executors, having right thereto, must pay the last half year's "rent due for the same." But the Court altered this judgment, and found, that the executors

* *M'Math v. Nisbet*, 14th December 1621. Durie. Mor. p. 15877: In which Nisbet, the proprietor of Restalrig, having died before Martinmas, and a creditor of his adjudging and pursuing for the rents of that year in which he died; the Court sustained action for the whole year, "seeing the land was not set out for "farm, but was laboured in mansing with the said James Nisbet's "own goods, who lived until after the Whitsunday that year." In the case of *Guthrie v. the Laird of Mackerston*, 25th July 1671. *Stair's Decisions*. Mor. p. 15891, the question occurred in somewhat of a different shape, for the heir did not dispute the executor's right to reap the crop, but he demanded rent for the use of the ground. It was answered by the executors, "That by immemorial custom, liferenters have right to the crop of lands sowed by "themselves, whether they attain to the term of Whitsunday or "not, neither were they ever found liable for any duty therefor; "which the lords sustained." It is obvious that this decision fixes, equally with the former, the executor's right to the crop sown by the deceased; and it fixes farther, that no rent is chargeable against the executor for the crop thus enjoyed.

were not liable to any rent for the crop of corn which was on the ground at the time of the life-renter's death, to which the executors have right by law; and to this judgment they adhered, led entirely by the practice and understanding of the country.*

In another very important case, the rule is thus stated by Lord Kilkerran:—"The rule for determining the several interests for heir and executor is very different in lands possessed by tenants, and in such as were in the natural possession of the heritor at his death. In those the executor has the one-half of the year's rent, where the heritor survives Whitsunday. But in these, whether the heritor survives Whitsunday or not, the executor has right to nothing but the crop, so far as the same was sown before the heritor's death; and the heir has right to whatever may be sown afterwards by the executors, on repaying the expense of seed and labour; and as for the grass and growing hay, the right of the heir commences from the moment of his predecessor's death."^b

* *Cockburn v. the Trustees of Brown*, 9th Nov. 1748. *Kilk. Terms of Payment, Legal and Conventional*, No. 7. *Mor.* p. 15911.

^b *Sidney Sinclair v. Sir William Dalrymple*, 7th December 1744. *Kaims*, No. 60. *Clerk Hume*, No. 266; and *Kilk. Terms of Payment, Legal and Conventional*, No. 4. *Mor.* p. 15908, and p. 5421. This case, while it confirms the principle of the former decisions, decides also several points of importance for regulating the interests of heirs and executors; these points are well stated in *Lord Kaims' Remarkable Decisions*, from which the following abstract of this instructive case is taken:—Sir John Dalrymple, after settling his moveable estate upon his spouse, died May 24, 1743, leaving the

This case confirms the rule deducible from the former decisions, and settles various other import-

land about his house of Cranston in his natural possession, most of it in grass, partly natural, and partly sown. One field of seven acres was sown the year before his death, and the first crop was not cut down when he died. Of the other sown grass he had reaped several crops. Towards the end of the year 1742, he had sown a field with rape-seed, but that failing, his purpose probably was to plough the field in June 1743, and to sow it with turnip; but the day after his death, it was tilled by his relict, and sown with barley. His heir took possession of the farm as well as of the rest of the estate, and cut down this barley crop. In a count and reckoning between the heir and the relict, she claimed the value of the barley crop, and of the artificial grass crop, as being moveable, and falling under her disposition. The heir endeavoured to support his right to the same as heritable subjects, by the following reasoning:—1. It is one of the privileges of the heir to continue his predecessor's possession; and when the possession of an estate is apprehended, either by an heir or a purchaser, it is a rule of common sense, as well as of law, that every thing that is *pars soli* must go with the land. 2. As this rule may appear to be hard and rigorous, when applied to some special cases, it has been softened in the practice of England and of this country. A liferenter ought not to be discouraged from making profit to himself, by taking land into his natural possession, in order to cultivate it; yet he runs this one danger, that if he die when the corn is ripe and ready for the sickle, his right dies with him; the corn, as *pars soli*, goes with the lands to the proprietor. This hardship has probably at first been remedied by particular pactions, and afterwards it has grown into universal practice, that the representatives of the liferenter should have the benefit of the liferenter's industry, so far as to be allowed to reap the corns growing at the liferenter's death. It is probable that this practice was first begun between liferenters and fiars, whose interests are commonly distinct, and where the hardships must have appeared great. It has afterwards been extended by analogy for the benefit of younger children, as they are but scantily provided by our law; and now it is established, that they shall have the corn growing upon the lands in their father's natural possession, though not a moveable subject. 3. This right, introduced in favour of the representatives of a liferenter and of the executors of a proprietor, which for the sake of utility devi-

ant points connected with the rights of heir and executor. Amongst others, the question, whether sown grass ought to be considered, after the first year, as belonging to the heir or to the executor, was decided. The doubt arises from this, that the executor is entitled to the crop wherever the deceased proprietor has laboured and sown it: Now, in regard to sown grass, it is clearly a crop arising from the seed and labour of the proprietor; and as there is no crop of grass the year that the barley is reaped, the executor of the pro-

ates from the principles of law, has never been extended farther, either in our practice or in the practice of England, than to corns usually sown and growing at the time of the liferenter or proprietor's death. Nor can it well be extended farther, if the rules of law be at all regarded: For as the proprietor's right is at an end with his life, as well as that of the liferenter, no man can be entitled to sow the ground, except in the right, or by the allowance of the present proprietor: after his right commences, the crop sown is as much his as when it is sown 20 years after the predecessor's death. 4. The exception has never been extended farther than to industrial fruits, which are sown and reaped annually. With regard to plants which remain longer in the ground than a year, neither the industry nor the expense are so great as to counterbalance the rule of law and of common sense, that whatever is fixed to the land must go along with the land. And were the exception to be extended beyond annual plants, its application would become unlimited; it behoved to be extended to every thing growing upon the ground that is the effect of industry, at whatever time sown or planted; and at that rate all planted trees would go to the executor, were they a hundred years old.—“ Found the defender Sir William Dalrymple, heir in the estate, hath right to the whole grass and hay the year libelled, it not being alleged that any grass seeds were sown that year: And found, that the pursuer has not right to any part of the barley crop sown by her after Sir John Dalrymple's decease, but that the defender is liable to the pursuer for the expense of the labour and of the seed.”

proprietor imagined that he had a good claim to the next crop of grass. But in Sinclair's case, it was found, that the grass crop, which had been sown the year preceeding, did not belong to the executor of the former proprietor; and this point was again under consideration of the Court more lately, when a similar decision was pronounced.*

These authorities seem to fix the following points in regard to the succession of the proprietor, who has been in the natural possession.

1. That the heir, instantly on the death of the proprietor, enters into the possession of the land, and enjoys its produce, with the exception only of such crops as have been sown by the proprietor, and not reaped at the time of his death.

2. That these crops, sown by the proprietor, and not reaped by him, descend to his executors; and that the second crop of sown grass, though it be the first productive crop, does not fall under the exception in favour of the executor, but descends to the heir.

* *Wight v. Inglis*, 10th February 1796. Fac. Coll. Mor. p. 5446. In this case, Simpson sowed clover and rye-grass along with wheat and barley on about 70 acres of land belonging to him: he died in December following, and his executors claimed the hay crop in Summer 1795, produced from the seeds sown in the year 1794. The Court rejected the claim: Observed on the Bench, "That the hay in question is to be considered as a second crop, and as such belong to the heir. It is true, the first crop would in this case be of little or of no value; but that arose entirely from wheat or barley having been sown amongst with the grass seeds; and as the crops arising from the former were reaped by the deceased, the executors are, by that means, fully indemnified for the deficiency or loss of the first crop of grass."

3. That the executor pays no rent to the heir for the ground occupied by the crops, which, under this exception, he enjoys.

4. That where the ground in the possession of the proprietor has been laboured and manured and prepared for the crop by him, it makes no difference on the right of the heir who is entitled to sow it, and the executors can ask no more than the expense which has been bestowed upon it by the deceased proprietor.

SECT. II.

THE TENANT'S SUCCESSION.

THE subject of the tenant's succession is the right of possessing the farm for the years of the lease unexpired at the death of the tenant. The lease, in this view, is a temporary title to land, which, carrying with it a tract of future time, cannot be exercised at once.* It is on this account

* Rights having *tractum futuri temporis* do not belong to executors; for this reason, that it is the office of executor to collect, without delay, the effects of the defunct, and to distribute them according to the respective rights of the parties concerned: now this cannot be done with regard to subjects which, having *tractum futuri temporis* after the demise of the defunct, do not even exist when the office of executor commences. On this ground, the Court preferred the heir to a right, having a tract of future time, although it was pleaded for the executor, that as it is undeniable that the

that the lease in our law has been reckoned heritable, and made to descend to the heir.

The lease, therefore, where no settlement has been made by the tenant, goes to the heirs of line, in the order pointed out by the law of succession in heritage.* It is, however, attended with this

right of the assignee to the liferent (the question arose on the succession of a person who had right by assignation to the liferent of a house vested in the cedent) would have fallen to the fisk by the forfeiture of his single escheat, so, by parity of reason, it ought to fall to his executor. *Ewing v. Drummond*, 29th Nov. 1752. *Fac. Coll. Mor.* p. 5476.

* As this book may come into the hands of those who have no law book in which they can find the line of succession, a table of the lines of succession in heritage is subjoined.

The ancestor, male or female, is succeeded,

I. BY HIS OR HER DESCENDANTS—that is,

1. By sons in their order, beginning with the eldest, and so on according to seniority.

N. B. Where the eldest son is dead, leaving children, his children succeed in his place, and they succeed by the same rule of succession which is here explained.

Failing the children of the eldest son, and their children in lineal descent, the succession returns back to the second son and his children, which is just the collateral succession to be immediately described.

2. By the daughters equally amongst them.

N. B. Where any of the daughters die leaving children, these children succeed to the share of their mother, the sons in their order as above, and failing them, the daughters equally.

II. FAILING DESCENDANTS, BY COLLATERALS, that is, failing children and their descendants, the ancestor is succeeded,

1. By his brothers.

N. B. The immediate younger brother succeeds first; on his death, the right descends to his children, according to the above rules; or should the immediate younger brother be dead before the succession opens, his children succeed preferably to the surviving brother of the ancestor.

peculiarity, that the lease is never held to be conquest. It is not a right which falls under the

If the ancestor be himself the younger brother, he will be succeeded by his immediate elder brother, and so on by the next immediate elder brother.

2. By his sisters equally amongst them.

N. B. Failing any of the sisters leaving children, these children succeed to the share of their mother, as in the succession of descendants.

III. FAILING DESCENDANTS AND COLLATERALS, BY ASCENDANTS; that is,

1. By the father of the ancestor.
2. By the father's brothers in their order, according to the rule of collateral succession.
3. By the sisters of the father, according to the same rules.

It will be farther observed, 1. That although children succeed to their mother, the mother does not succeed to her child, nor of course does any one succeed, whose connection is solely through the mother.

2. That in collateral succession, the full blood excludes the half blood, (that is, children by the same father, but by a different mother); failing the full blood, the brothers and sisters by the half blood succeed, according to the same rules, as in the case of full blood: this distinction of full blood and half blood has no place in the succession of descendants.

To give an example, suppose a tenant to die, leaving two sons and two daughters; the eldest son succeeds to the farm. If the eldest son be dead leaving a son, then that son succeeds to the farm in preference to the surviving son and daughters of the tenant: or should the eldest son have left a daughter and no son, that daughter will in like manner exclude the surviving son and daughters of the tenant: should the eldest son have died leaving no children nor grand-children, then the second son succeeds, and failing him his sons and daughters, in preference of the tenant's two daughters; or should the two sons have died without leaving descendants of their bodies, then the two daughters of the tenant will succeed equally: or if we suppose that one of the daughters has died leaving a son, that son will succeed to one-half, and the surviving daughter to the other half of the lease: or should the deceased daughter have left no son but two daughters, then these two daughters succeed to one-half of the lease, each having a fourth share, and

denomination of conquest, since it cannot be established by sasine; for although sasine be not absolutely requisite to entitle an heir of conquest to succeed, yet the right must be capable of being perfected by sasine, before it can fall under the description of rights belonging to the heir of conquest. If, for example, the second of three brothers purchase an estate, the titles to which are taken to heirs and assignees; on his death, it goes to the eldest brother, as the heir of conquest, and not to the younger brother, who is the heir of line. But the lease is not held to be conquest; it goes to the younger brother.*

The tenant's right under the lease then descends to his heirs, according to the line of succession in heritage, with this difference, that the lease is never held as conquest, nor does it in any case descend to the heir of conquest;^b collation, too,

the surviving daughter of the tenant will have right to the other half.

This explanation, with the assistance of the table, will give a sufficiently accurate notion of the line of descent of the tenant's interest in the lease.

* Stair, Book III. tit. v. § 10. Bank. Book III. tit. iv. Ersk. Book III. tit. viii. § 16. *Ferguson v. Ferguson*, 23d June 1663. Stair. Mor. p. 5605. The case is thus stated: "Ferguson in Restalrig having a tack set to him by the Lord Balmerino for certain years, his eldest brother's son, as heir of conquest, and his younger brother's son, as heir of line, competed for the mails and duties of the lands. The Lords found the tack to belong to the heir of line, albeit it was conquest to the defender."

^b Leases taken, secluding executors and assignees, were found to be conquest, under a clause in the lessee's marriage-contract, conveying "all heritages, goods, gear, debts, sums of money, or other moveables, which should be conquest during the marriage," provided the term of entry in the leases had arrived before the death

may take place here, in the same way as in the succession of heritage.*

of the lessee. But certain new leases, conceived in favour of the same lessee, but the terms of entry in which had not arrived before his death, were found not to be conquest of the marriage. In this case it seems to have been held, that although leases were not expressly mentioned, yet the terms of the marriage-contract were sufficiently comprehensive to convey them to the heir of conquest. *Duncan v. Raes*, 15th February 1810. Fac. Coll.

* The right of collation is a privilege possessed by the heir, of giving a share of the heritage to the executor, and claiming from the executor a share of the executry funds. And here, I am enabled to subjoin a *case*, with the *opinion* of a very eminent lawyer, regarding collation between the heir and executors of a tenant.

CASE.—A tenant died, leaving a son and daughter, both of whom had discharged their father of all they could demand, previous to his entering into a second marriage; but having died without leaving any heir of that marriage, the son and daughter succeeded, *ab intestato*.

The tenant held three farms, 1. A very lucrative lease, of which only a few years were to run; this lease secluded assignees and subtenants. 2. A farm held under a lease excluding assignees and subtenants; on this farm a good deal had been expended, but it was not worth any premium. 3. A farm where assignees were allowed under the lease, though of no value. The executry left by the tenant is of far more value than the leases.

Quer. Can the son take the leases, and the half of the executry also? or is a tenant's son, by continuing his father's possession, considered as an heir, although no service is required, and as an heir excluded from the executry without collating? and *lastly*, if collation be necessary to entitle the son to a share of the executry, can the landlord, who, under the exclusion of assignees, in the leases will admit no person but the son of the tenant, prevent the collation from taking place?

Answer, Although it is understood, that the tenant's heir may possess, and vest the right of a tack in him without service, yet, by so doing, he represents his father, and incurs a passive title. A tack is likewise considered as an heritable subject; and I apprehend, that the heir cannot both claim right to the tack as heir, and to his share of the moveables, as one of the nearest of kin, without collating. And although the lease contains a clause

We have next to inquire, what the rule is for dividing the succession between the heir and executor of the tenant. It is obvious, that the situation of the tenant nearly resembles that of the proprietor, who is in the natural possession of his own land: the heir of the tenant, in the same way with the heir of the proprietor, enters into the possession of the land immediately on the death of the tenant. But here, too, there occurs the question of the sown crops; and the law has, for the same reason, as in the case of the proprietor, given these crops to the executors of the tenant.

But there is a distinction. We have seen that the heir of the proprietor could not demand a rent from the executor for the ground occupied by the sown crops, which go to the executors. The same question has occurred between the heir and the executor of the tenant; and although there certainly does not appear to be much difference between the two cases, yet they have been differently decided; and, in the case of the tenant, the rent of the farm has been divided, and a proportion of the rent, corresponding to the crops reaped by the executors, has been laid upon them.

excluding assignees, I do not think this will bar the collation, because heirs are not excluded; and the effect of the collation is only to make the whole descend equally among the children, as if they were heirs portioners. If there had been several daughters, and no sons, the landlord could not have objected to the whole daughters succeeding equally, and neither can he object to the collation in this case, if the heir finds it to be for his interest.

396 RULE FOR EXECUTOR'S SHARE OF CROP.

This precise point does not seem to have been decided by the Court till 1791;^a though some observations made by Lord Kilkerran, in reporting a case connected with this question, show, that doubts were entertained about it; and that when the question should occur, unfettered by precedent, probably a different decision might be given. He says, "were the question entire, there might
"have been much to say for the Ordinary's interlocutor, as it is not obvious why the right
"of the heir should be less where the life-rentrix
"possessed by herself, than where she possessed
"by a tenant; but as the difference is established
"in practice, by which no rent was ever found
"due by the executors for the crop, to which they
"had right, *et omnium quæ a majoribus*, &c. the
"Lords found as above."^b

At last the question occurred between the heirs and executors of the tenant, in such a shape as to be little affected by precedents. In that case, a tenant was creditor to his landlord in a certain sum. On the death of the tenant, his lease descended to his eldest son, and his executry to the younger children. When the landlord came to pay the debt to the younger children, the heir had become bankrupt, and the landlord claimed

^a I have seen the opinion of the same counsel, to whose opinion I have so lately referred, directing the rent of a farm to be divided between the heir and executor, in proportion to their interest in the crop of the farm the year of the tenant's death. This opinion was given in 1780.

^b *Cockburn v. Executors and Trustees of Brown*, 9th Nov. 1748. Kilk. p. 569. Terms of Payment, Legal and Conventional, No. 7. Mor. p. 15911. *Supra*, p. 386.

retention, out of the debt, of the arrears of rent due for the farm. The crop, after the death of the tenant, had gone to the younger children; the subsequent crops had been enjoyed by the heir. The pleading does not appear to have rested so much on the circumstance of the younger children having enjoyed the crop after the tenant's death, as on the general argument, that the whole heirs of the tenant were liable for the rent; and although the heir in the lease might be ultimately liable, yet the landlord was entitled to make his demand on any one of them, and, of course, to retain the arrears out of the debt due to these heirs. To this it was answered, that all the heirs of the tenant are no doubt liable for the rents due by the tenant at the time of his death; but they are not liable for the rents falling due after that period. In a mercantile partnership, if the concern was a lucrative one at the death of a partner, his heirs are not liable for any subsequent loss; and in the case of a feu, though the executors of the vassal may be required to pay the feu-duties due previous to the death of the feuar, they are never held to be liable for the subsequent feu-duties, when the heir becomes bankrupt: besides, this demand on the nearest of kin, who are deprived of all relief, would be exceedingly unjust, while the landlord, who has his right of hypothec for his protection, can suffer no loss by being deprived of any title to claim against the executors. The Court, considering the crop, immediately after the tenant's death, as belonging to the executors, were of opinion, that they were

liable for the rent of that year; but as to the rent of the subsequent years, a great majority were of opinion, that the heir alone, after being acknowledged by the landlord as tenant, could be sued for these rents.*

There are thus two points fixed; 1. That where an executor of a tenant has right to any part of the crop of the year in which the tenant died, he must pay a part of the rent of that year, in proportion to the value of his share of the crop: 2. That where the landlord has accepted of the heir, the nearest of kin are not liable to the landlord for the rents of any crop subsequent to the death of the tenant.

But there is a distinction which has been already hinted at: for example, when the rents have been anticipated, and the rent of the crop has been paid before the death of the tenant; perhaps it may be justly questioned, whether any part of that rent can be claimed from the executor. In the ordinary case, where the rent remains unpaid, there seems to be a natural connection between the rent and the crop, which has authorised our Judges to depart from the rule applicable to the case of the proprietor, and to throw the rent on the executor who enjoys the crop; but where the rent has been paid by the tenant himself, there seems to be an appropriation eventually to the use of the executor, which ought to secure him from the demand.

* The Duke of Gordon v. Lealie and Others, 8th March 1791. Mor. p. 5444.

SECT. III.

THE NATURE OF THE TITLE IN THE PERSON OF
THE HEIR.

THE heir, by the law of Scotland, completes a title to heritage by service; in which there is not only an acceptance of the succession by the heir, which makes him represent the former proprietor; but the decision of the Court of Service, finding that the person claiming is the proper heir in the subject. This does not seem to be required in regard to the lease. The mere character of heir, followed by possession, is held to be a sufficient title in the heir succeeding to a lease. In a leasehold right, which expires by the course of time, that course is not uninterrupted by the non-entrance of an heir; and this, added to the small estimation in which leases must have been originally held, may account for the dispensing with the form of a service,—a form which must have been frequently attended with an expense which the heir of the tenant was unable to bear. But to whatever cause it is to be ascribed, the practice has been of long standing; since, in a case in Lord Stair's time, it was successfully argued, that "there was no necessity to serve heir for the enjoyment of tacks, but the party who had right to be heir might bruik the same without any service, *according to ancient and unquestionable custom.* The Lords found, that

“there was no necessity of a service of the heir of a tacksman.”^a This doctrine was at one time doubted, where the lease is given to a tenant and his heirs for the life of the heir; for unless there be a service, how shall it be ascertained who is heir. In one case, the right of the assignee was thought not to be good, as assignees were excluded; but the Court found the following argument relevant:—“The apparent heir, albeit he may brük *hoc nomine*, yet he could not transmit nor assign except he had been served heir, otherwise the assignee of the apparent heir might brük during the life of his author; and yet, after the death of the author, another might come and serve himself heir to the first person, and brük during that heir’s lifetime, and so the tack would be extended to a liferent longer than was granted.”^b But this question occurred in a latter case, where the Court were called on to decide with more precision, and they by no means went into this idea; on the contrary, they held that the first heir required no service. It was a case where a lease was given to a tenant in liferent and to his heir, and for 19 years thereafter; and the question came to be, at what time, under the following circumstances, did the 19 years commence? The tenant died, leaving two sons; the eldest neither possessed the lease, nor was served heir to his father when he died; the second son succeeded,

^a Hume v. Johnston, 9th July 1675. Stair. Mor. p. 14375.

^b Rattray v. Graham, 14th February 1623. Durie. Mor. p. 10366.

and was served heir to his father, and died also; so that the question was, which of these two was to be held as the father's heir in the lease. If no service is required, then the eldest son must be considered as the heir, and the 19 years will run from his death; if a service is necessary for pointing out the heir, then the 19 years cannot begin to run till the death of the second son, who was regularly served heir to his father. In this case, the eldest son never possessed: now, although, where the heir does possess, a service may be dispensed with, yet there can surely be no heir without representation, and no representation without some act on the part of the heir for proving his acceptance; yet, in this case, the Court found, "that the eldest son surviving his father, *although he never possessed*, was the first heir as to the tack, and that he needed not to be served heir." This decision, however objectionable it may be on the particular question of possession there agitated, sufficiently establishes the rule, that no service is required to constitute a title to the lease in the heir of the tenant.*



The rule, then, is clear with regard to the possession of the heir. The act of possession makes him represent the ancestor, and entitles him to hold the possession under the lease, without any other form of law.

A distinction at one time appears to have been made between the title sufficient for possession,

* The date of this decision and the names of the parties have been accidentally omitted in the former editions of this work, and as the case referred to does not appear to be reported, the defect cannot be supplied.

and the title sufficient to enable the tenant to assign or transfer his right; at least, such an opinion seemed to receive the sanction of the Court, in the case of *Rattray v. Graham*;* for there the Court found it relevant, to infer an inability on the part of an heir to assign, that he had not completed a title to the lease by service. But this was a point, which the Court were not at that time called on to decide, as the heir, even when served, would have had no title to assign; and a few years afterwards the Court found, that a special charge was not required in leading an adjudication of a lease, because the heir had right to a tack without a service;^b and more lately the Court have acted upon the same principle.^c

* *Supra*, p. 400.

^b *Rule v. Home*, 19th June 1635. Mor. p. 14374.

^c *Campbell v. Cunninghame*, 16th Feb. 1739. *Kilk. Service and Confirmation*, No. II. Mor. p. 14375. This case is reported by Kilkerran, in the following terms:—"Captain Charles Campbell, purchaser of a part of the estate of Bóquhan, in a sale, at the instance of the apparent heir, having craved a deduction from the price, effeiring to the value of the teinds, on this ground, that the defunct bankrupt had no right thereto, the alleged right being an old tack of the teinds to one of the defunct's predecessors, to which he had made up no title by service; without which, it was pleaded, that though he had right to possess, he could not have conveyed, and therefore the teinds could not be sold by the present apparent heir as an estate that was in the defunct. The Lords found, that the defunct having been in possession of the teinds, upon the tack, the right to the tack was fully established in him without a service.' Though it was said by the Lords, who were not clear about this point, that, as this judgment, which supposed the heir's power to convey without a service, was new, it must, as a consequence, introduce this farther novelty, that a tack should be in *hereditate jacente* of the apparent heir, and affectable by his creditors."

Notwithstanding these authorities, Bankton. has laid down a contrary doctrine,^a but his opinion has not been followed; and an heir is now held to be entitled, not only to possess under a lease, but to assign it without the necessity of completing any title in his person. There does not appear to be any reported case since Kilkeran's time; but so much is the point now settled in the opinion of the Court, that a petition was refused without answers, which called in question the power of an heir to assign who had made up no title to the lease.^b

^a Bank. B. III. tit. v. § 9.

^b Hay and Wood, petitioners, 8th Dec. 1801. Fac. Coll. Mor. p. 15297. The law as stated in the text is understood to be fixed, but it is proper to observe, that in this case of Hay and Wood, so far as appears from the Faculty Report, the heir's right to assign the lease without a service was not questioned. The assignation was objected to upon a different ground, so that the case can hardly be cited as a decision on the point, although it certainly shows that this was not regarded by the parties as a question about which there could be any dispute.

It has also been decided, and is now understood in practice, that a service is not necessary, in order to entitle the heir in a lease to challenge and reduce, upon any legal ground, a conveyance of the lease made to his prejudice. *Scott v. Baird*, 26th June 1754. Kaims Sel. Dec. No. LXIII. Mor. p. 14376.

CHAP. VIII.

OF THE ACTIONS ARISING ON THE LEASE.

THE subject of this chapter will be considered under the following heads: 1. Actions at the instance of the landlord for enforcing the stipulations of the lease, or supporting his legal rights under it: 2. Actions of declarator of irritancy, founded on the conditions of the lease, or on statute: 3. Actions or diligence for recovering rent: 4. Actions of removing: 5. Actions at the instance of the tenant. The object of some of these actions may be accomplished summarily by letters of horning and caption,* following on the

* LETTERS OF HORNING, are letters issued in the name of his Majesty, and passing under his signet. They are prepared by the writers or clerks to the signet, and are addressed to messengers at arms (as Sheriffs in that part), who are ordered to charge the party, against whom the letters are taken out, to pay or to perform within a certain number of days, (six or fifteen, as the letters proceed on a clause of registration, or, on the decree of a Court); and, should they disobey the charge, they are certified that they will be declared rebels, and put to the horn (see note page 25), and all other diligence used against them.

Where the charge is to perform an act, the failure of the debtor can be followed by imprisonment only; where it is to pay, the

clause of registration in the tack, the advantages of which have been already pointed out.*

A lease or any other legal deed, regularly executed, and containing a clause of registration for diligence, may be recorded, either in the register of the Court of Session, or of the Commissary Court of Edinburgh; or of the Judge Ordinary; and the extract of it forms a sufficient warrant for summary diligence against either of the parties, for compelling him to implement the obligations incumbent on him under the deed.^b

consequence, in addition to the imprisonment, may be that of poiding the goods of the debtor. The debtor's effects, in the hands of third parties, may also, in the latter case, be arrested, even before denunciation, in virtue of a warrant to that effect, which is contained in the letters of horning. Imprisonment, where that is resorted to, as the means of enforcing the charge, is made in virtue of letters of caption, which are letters also issuing in the King's name passing the signet, and directed to magistrates and messengers at arms, ordaining them to imprison the debtor, until he shall obey the charge given in terms of the letters of horning.

The particular forms of these letters, with the proceedings that take place on them, will be found in the appendix, connected with this chapter, No. III. § 1. In technical language, they are termed diligences, "because (as Stair says, p. 705, § 1,) they excuse the users thereof from negligence, whereby posterior diligences, being exactly followed, are preferable to prior diligences being neglected, *vigilantibus non dormientibus jura subveniunt*, which is founded on that great interest, to hasten pleas to an end. They are also called diligences, because, though the effect do not follow, yet the user thereof hath endeavoured what he could, and so is held in the same case as if he had obtained the command of the precept."

* *Supra*, p. 212.

^b Appendix, No. III. contains examples of the different writs, with an account of the procedure which takes place in accomplishing their objects.

From the nature of the lease, the obligations are principally come under by the tenant, and this form of proceeding will therefore be useful chiefly to the landlord. The tenant becomes bound to pay the rent, or to remove from the farm at a particular term; these are specific obligations, perfectly calculated to be made effectual by diligence proceeding upon the extract of the registered lease: but there are other obligations, of a more indefinite character, which can be enforced only by an action, where the circumstances, forming the ground of action, may be fully proved, such as an obligation by the landlord to repair eventual damages to the tenant. Before a claim under such an obligation can be enforced by diligence, it would be necessary that the extent of the damage be ascertained and the sum liquidated by the decree of a competent Judge.

The letters of horning, therefore, which follow on the decree of registration, must be for specific obligations. Where the obligation is to perform an act, specified in the lease, the letters will contain no warrant for poinding or arresting, but merely for charging the party to perform the act in terms of his obligation, under the pain of imprisonment. But letters of horning, for payment of a sum of money, will contain a warrant both for poinding and arresting. It is proper also to observe, that letters of horning for rent may contain a warrant for charging, not only for rents due at the time of raising the letters, but for future rents, "the terms of payment thereof being already first come and bygone."

These observations, with the forms in the appendix, will, it is presumed, sufficiently explain this part of the subject.

SECT. I.

ACTIONS FOR ENFORCING THE CONDITIONS OF THE LEASE, OR SUPPORTING THE RIGHTS OF THE LANDLORD.

1. *Actions to force the tenant to possess, stock, and labour the farm.*—The landlord is entitled to insist, that the tenant shall enter into possession, and stock and labour the farm, in such a manner as may secure the rent by the right of hypothec over the tenant's crop and stocking.*

But a doubt may arise here, as to the nature and extent of the stock. The action will proceed

* This was disputed in a case, *The Laird of Randfuir* against his Tenant, 27th February 1623. Durie. Mor. p. 15256, *et Supra*, p. 251. Here the term of entry was at Martinmas, and in January following the tenant had not entered; on which the landlord brought an action, concluding that the tenant should be decerned to enter into possession, and to labour the farm. The defence stated was, That this action is a novelty in the law, and ought not to be sustained; that the tenant ought not to be compelled to enter to the farm, or to labour it, but at his own pleasure; for, if he should never enter, or if he should suffer the farm to lie lee for grass, it was the same to the landlord, for he could have no action on the tack against the tenant, but for the rent, which he could not demand till the terms of payment were past, at which time he should be answered as reason and law required. The Court repelled this defence, and found that the tenant was bound to enter, and plenish the farm with goods and corn, whereby the ground might be more answerable to the landlord for payment of the rent.

on a narrative of the tenant's having entered into a lease of such a date, whereby he became bound to stock and possess the farm; that in place of entering into possession, and properly stocking and labouring the farm, he had either totally neglected it, or had not sufficiently stocked the farm, (according to the circumstances of the case); and, therefore, the summons will conclude, that the tenant should be decerned to enter into possession, and to labour and stock the farm in terms of the obligation in the lease, and consistently with the nature of his obligation as a tenant.* The lease signed by the tenant would sufficiently support the conclusions of this action.

Defence in this action.—It will be no relevant defence for the tenant to say, that he is not bound to enter into possession, and to stock and labour the farm, and that it is sufficient if he pays the rent when it falls due.^b Neither is it relevant for the tenant to say, that he has stocked the farm with articles over which the landlord's hypothec does not extend; as, for example, that he has taken in the cattle of others to graze.^c But if the ten-

* See Appendix III. No. 2.

^b *Randefuird v. Tenants*, February 1623. Mor. p. 15256. *Supra*, p. 251 & 407.

^c *Ross M'Kay v. Nabony*, 4th. December 1780. Mor. p. 6214. Nabony possessed a farm belonging to Mr. Ross M'Kay, which consisted of several large inclosures laid down in grass, and instead of stocking it with cattle of his own, he admitted those of others to pasture on it. The landlord, apprehensive that in this manner his right of hypothec would be rendered ineffectual, brought an action of removing against the tenant. The tenant urged the propriety of the measures adopted by him as agreeable to the

ant were to state that, besides the cattle taken in to graze, he had other stocking and property on the farm sufficient to pay the rent, that defence would be relevant, and would be admitted to proof.

Of course, the defence, that the farm is sufficiently stocked and laboured, is relevant in such an action, and on it the parties would join issue, and the fact would be sent to proof.

2. *Action founded on the tenant's having deserted his possession.*—Were the tenant to desert his possession for any considerable length of time, or in such a manner as to indicate a decided intention, on his part, to abandon his lease, the landlord would be entitled to enter into possession of the farm, and to prevent the tenant from resuming possession.*

nature of the subject let, and to the practice of the country: And farther insisted, that the value of his property on the farm was fully adequate to the landlord's security. Of this last averment a proof was allowed, in which, the defender having failed, the Court therefore decreed in the removing. Sometimes the landlord inserts an express stipulation in the lease, obliging the tenant to possess the farm with his own stocking only. See a case of this kind, where such a stipulation was judged of, *Lord Stonefield v. M'Arthur*, 18th December 1800. *Fac. Coll. Mor. App. voce Removing*, No. 3.

* *Taylor v. Maxwell*, 28th Nov. 1728. *Folio Dict. Vol. II. p. 426. Mor. p. 15310.* "A tenant, who had a tack for many years to run, becoming bankrupt, deserted his possession and left the country; the master thereupon apprehended possession *brevis manu*, without using any legal order. The tenant re- turning before expiration of the tack, insisted in an action against his master for re-possession, contending, that the tack was still a subsisting deed, since the master had never insisted in a declarator of any of the irritancies incurred by forsaking the possession, and neglecting to pay the tack duties. An-

As the desertion, however, may often be attended with equivocal circumstances, it would be advisable, in order to exclude the tenant from reclaiming possession, to have the forfeiture established by the decree of a Judge; and where the circumstances admit of it, the action for this purpose ought to be laid upon the Act of Sederunt 1756.*

"swered, *unumquodque dissolvitur eodem modo quo colligatum fuit*, the pursuer, by deserting her possession, had shown her *animus* of throwing up the tack, the defender showed the same *animus* by apprehending the possession. The Lords found, that the pursuer's relinquishing the possession, and not claiming the same for several years, is relevant to exclude her from being re-possessed." *Downie and others v. Graham*, 14th June 1715. Bruce's Coll. Mor. p. 1472p, illustrates the rule by showing an exception to it. In this case "Downie and three other fishers, being tenants in some acres of land to Graham, for which they paid a small silver duty, besides the teind of all fishes they brought on his ground, with some other casualties, such as carriages, &c. they at Whitsunday 1712 do all suddenly remove from their possessions, and carry off with them their plenishing, &c. leaving only the crop on the ground; but in harvest thereafter they sent and made offer to the landlord, under form of instrument of their year's money rent, and caution for all other debts which he should verify against them, and thereupon required liberty to cut down their corns, which Graham refused; whereupon their procurator protested against him for damages, if he should hinder or divert them from shearing or ingathering their crops at any time after the date of the instrument. Notwithstanding whereof, the landlord caused shear and in-bring the crops: Whereupon a process of spulzie being intended at the tenant's instance, the Lords found the landlord's intromission with the goods libelled, belonging to the tenants, was illegal and unwarrantable, and interferred a spulzie."

* The Act of Sederunt 1756, § 5, provides, that "where a tenant shall run in arrear of one full year's rent, or shall desert his possession, and leave it unlaboured at the usual time of labouring, in these, or either of these cases, it shall be lawful to the heritor, or other setter of the lands, to bring his action against the tenant

3. *Actions for cutting wood, &c. on the statute.*

The preservation of the wood upon the farm is secured by the act 1698, c. 16, and is sometimes attempted to be farther secured by clauses in the lease, binding the tenant to preserve the wood and growing timber. The nature and effect of the act have been formerly considered in treating of the landlord's rights.* The action founded on it may be brought either before the Court of

" before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is for a shorter endurance than five years, within a certain time to be limited by the Judge; and failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined, and the tenant had been legally married, in terms of the foresaid act 1555." But there seems to be little doubt that the landlord's right to resume possession of his lands on the desertion of the tenant, still exists independently of the Act of Sederunt, as it is proved by the decisions cited in the last foot note, to have existed prior to the date of that act; and circumstances, therefore, might occur which would entitle the landlord to declarator of forfeiture, although the Act of Sederunt could not be founded upon. If the tenant have carried off his stocking from the farm, and entirely abandoned the possession, there is no reason why the landlord should wait until after "*the usual time of labouring*," before taking the lands into his own possession. By such delay he might incur the loss of a year's crop; and in such circumstances he would unquestionably be entitled to enter into possession immediately, and to bring a declarator of forfeiture. If the tenant failed to appear, decree would be pronounced, which would, effectually exclude him from the benefit of the lease. On the other hand, should the tenant offer to return before decree, although the landlord will not be entitled to require caution in terms of the Act of Sederunt, he seems clearly entitled to some security from the tenant, which will be regulated by the Court according to the circumstances of the case.

* *Supra*, p. 265.

412 ACTION FOR DESTROYING GROWING WOOD.

Session, or the Judge Ordinary of the bounds, and the forms and conclusions of it will be the same in either case. The summons states the provision of the act: it then subsumes, that the tenant by himself, his servants, or others, has cut and destroyed a certain number of trees, growing on his farm; and the conclusion is, that he may be decreed to make payment of the statutory value.^a

Defence against this action.—The defences that may be stated by the tenant are various, and may be easily collected from what has been already said upon this subject.^b The defender may be able to prove that the trees were not cut or destroyed by him or any of his family or servants; and in that case it would rather appear, from the terms of the statute,^c that he ought to be exempt from the penalties. But the decisions upon this point are not very distinct; and where the trees have been actually destroyed, it seems not to be altogether settled whether the landlord or tenant is bound to prove how and by whom they were destroyed. Difficulties have also occurred as to the mode of proof, and the power of the Court to modify the statutory penalties when they have been actually incurred; but as the reported cases upon these points have been cited above, a reference to them, and to what has been already said, will probably suggest the nature of the defence applicable to the circumstances of any case which may occur.

^a See App. III. No. 3.

^b *Supra*, p. 266.

^c See Stat. 1698, c. 16, fully quoted in foot note, *supra*, p. 266-7.

Action for cutting wood proceeding on the terms of the lease.—Where the tenant becomes bound in his lease to preserve the wood and planting on his farm, it affords a ground of action for such trees as he may have cut or destroyed: but it infers no farther damage, nor is it any ground of irritancy of the tenant's right.*

An action of this nature may become necessary where the trees are not on the farm possessed by the tenant, and where, of course, the act 1698, c. 16, does not apply. In the appendix there will be found the form of an action, where the damage is done, not on the tenant's farm, but on an adjoining farm, or on the ground in the possession of the landlord. This action is founded on the act 1685, c. 39, and must depend entirely on the proof that the pursuer is able to bring.

The other actions founded on the conditions of the lease, or on the acts of the tenant, must be actions *præscriptis verbis*; and it would be idle to attempt giving examples of summonses which must depend upon the circumstances of the case, and which no man of business can be at a loss to frame.

* Duke of Roxburgh v. Kerr, 23d January 1729. Folio Dict. Vol. I. p. 485. Mor. p. 7202. In this case, an action was brought for voiding a tack, upon the ground that the woods, which the tacksmen had expressly bound himself to take care of, were neglected and destroyed. It was answered, that this is not a statutory irritancy, nor made an irritancy by the tack, and therefore can only infer an action of damages; and this plea was sustained by the Court.

SECT. II.

ACTION OF DECLARATOR OF IRRITANCY, FOUNDED ON
THE CONDITIONS OF THE LEASE, OR ON STATUTE.

It sometimes happens, that the prohibitions in the lease to subset or assign, are guarded by an irritancy, and the subsetting or assigning is declared to be an *ipso facto* voiding of the lease. In like manner, where the tenant falls two years in arrear, it is sometimes declared by the lease to be an irritancy. These irritancies, where they occur, ought to be declared by an action before the Judge Ordinary.

Summons of declarator of an irritancy.—The summons in this action, which is called a declarator, states the nature of the irritant clause, subsumes the circumstances under which the irritancy has been incurred, and concludes for a decree declaring the irritancy to have been incurred, and for having the lease forfeited and declared void in all time coming.*

Defence against this action.—In regard to irritancies, a distinction arises from the nature of the right of which they make a part. Where they are inserted in a gratuitous right, they are judged of more favourably than where they occur in an onerous deed. In deeds of the former description, an irritancy will be effectual without a declarator, but

* See Appendix III. No. 4.

an irritancy of an onerous deed must be established by a decree, and the grounds of forfeiture may even be purged at the bar. The lease, in which the possession of the tenant is merely commensurate to the payments which he makes to the landlord, and under which, indeed, he must in the general case be in advance, confers on the tenant an onerous title to retain his possession, and an irritancy of it is truly of a penal nature. It may, therefore, be received as a general rule, that the irritancies of the lease are purgeable after the institution of the action of declarator; and although it has been found that an irritancy of a lease is not purgeable at the bar,^a yet a different rule now prevails; for in a latter case, where a landlord had pursued a declarator of irritancy, and obtained a decree in absence against the tenant, the Court were of opinion, that as the tenant had consigned the rent on the summons being executed, although decree afterwards went against him, yet that the consignment was equivalent to a timely purging of the irritancy, and therefore they suspended the decree, and expressed an opinion, that all irritancies of this nature are purgeable at the bar; and that, even although decree had passed in absence, and had been extracted, it would be hard on that account to subject the tenant to so heavy a penalty.^b

^a *Finlayson v. Weir and Clayton*, 36th June 1761. Mor. p. 7239.

^b *Campbell v. Macalister*, 16th January 1777. Mor. p. 7252, and App. *voce* Irritancy, No. I. See these cases referred to, *Supra*, p. 158. See also *Kinloch v. M'Comie*, 16th June 1812. Fac. Coll., *et Supra*, p. 185.

The defence, therefore, against an action of declarator of irritancy, must consist in an offer to purge the irritancy, that is, to pay the rent where the irritancy is for a failure in the payment of the rent, or to produce a renunciation or a decree of reduction of a sub-lease, where it is founded on the tenant's subsetting the farm; and this defence will be sustained. But should the tenant be so inattentive as to allow a decree in absence to go against him and be extracted, he may find it difficult to get quit of the irritancy; and beyond all doubt where there has been an appearance for him, however absurd the defence, he will, on that decree becoming final, be deprived of all relief. Of this there was a very strong example in an action of declarator of irritancy at the instance of the Duke of Argyle against one of his vassals. Appearance had been made in the action of declarator, while the defender was confined by sickness, and merely to gain time for receiving information; but the decree having become final, even this appearance was held sufficient to render this a decree *in foro*, and the Court refused to open it up in a reduction at the instance of the defender, in which he offered the arrears of feu-duty with interest upon interest, and whatever should be necessary for affording complete indemnification to the superior. "The Court considering the statute in question (1597, c. 246,) as still in force, and that though irritancies such as the present, might be purged at the bar, this opportunity had been here neglected, and could not be renewed, and therefore they found themselves under the necessity

“ of assoilzieing from the reduction ; but not with-
 “ out expressing regret, that it was not in the
 “ power of the Court to give relief to the pur-
 “ suer.”^a

SECT. III.

ACTIONS OR DILIGENCE FOR RECOVERING RENTS:

UNDER this head will be considered ; 1. The diligence competent for enforcing payment. 2. The actions which may become necessary for rendering the heir of the tenant liable. 3. The proceedings for rendering the right of hypothec effectual. 4. The means of security afforded to the landlord by the Act of Sederunt 1756. 5. The proceedings in the landlord's baron court.

1. *The diligence competent for enforcing payment.*—This subject has been anticipated by what has been said of the letters of horning for enforcing the conditions of the lease in general;^b since the letters of horning, on the decree of registration of the lease, enable the landlord, from the manner in which they are expressed, to give

^a Ballenden v. the Duke of Argyle, 6th July 1792. Fac. Coll. Mor. p. 7232. It will be observed, however, that this was a declarator of irritancy of a feu-right; and that the statute 1597, c. 146, is directed exclusively against the non-payment of feu-duties.

^b *Supra*, p. 212 and 405.

a new charge on them, on the arrival of each term, which charge the tenant must obey, or be subjected to the farther diligence, either of poinding of his effects, or of caption on which he may be imprisoned.

2. *Actions which may become necessary for rendering the heir of the tenant liable.*—The decree, proceeding on the clause of registration, is a warrant for diligence against the tenant; but in case of his death, the clause of registration is of no farther use, and no diligence can, under it, be used against his heir. This arises from the nature of the clause, which is a mandate, and falls by the death of the mandant; and although the act 1696, c. 39, so far supports this clause as to allow the deed to be recorded after the death of the granter, it is only to the effect of "making faith in judgment and outwith the same, in the same manner as if the writ had been registered before the granter's death." But it could not have been rendered, nor was it meant to render it, the foundation of diligence against the heir of the granter.

On the death of the tenant, therefore, no summary diligence can proceed against his heir; it is only in the form of an action that he can be affected. Where the heir enters into possession, or rather continues the possession of his predecessor, he becomes thereby liable to implement all the conditions imposed on the tenant by the lease. But it will seldom happen, that any action will be brought against him, until it be required, either in consequence of his falling in arrear of

rent, or neglecting to implement some of the conditions of the lease, or where a removing is to be reported to. In these cases, an application will be made to the Judge Ordinary in the common form, and the possession of the heir will be stated as a sufficient representation of his predecessor, to the effect of rendering him liable to implement the conditions of the lease.

The heir's defence.—In these actions, founded on his possession, where it is admitted the heir can have no defence to urge against his liability, his possession unquestionably infers a representation, and renders him directly liable, as enjoying the present advantages of the lease.

The only defence, therefore, which the heir can make, is to renounce the succession. This will save him from any personal decree; but he may renounce under various circumstances. Thus the lease may be a lucrative concern, but the general state of the tenant's affairs may be such as to deter the heir from entering into possession of the farm, and thereby incurring a passive title; or the tenant's situation may in other respects have been good, but the lease unprofitable. In the first of these cases, where the lease is the only subject from which the creditors have a prospect of recovering any thing, and more especially where it excludes assignees, it is the duty of the heir not to renounce, if he can be of any service to the creditors. They may perhaps wish him to enter, and to appoint a manager, who shall be accountable to them, and for whom the heir shall not be responsible in any shape; and if they do,

the plain dictates of honesty require that the heir should not, by his renunciation, deprive the creditors of the ancestor of a property to which they have so just a claim; on the contrary, it is a duty he owes these creditors to do all for them that he can do with safety to himself.

In the other case, where the lease is unprofitable and the heir finds himself unable to enter into possession without risk, the landlord has still the effects of the deceased tenant, to which he may have recourse as a security for implementation of the conditions, and for the damage he may sustain by the death of the tenant, and the dereliction of the heir. In this case, it is probable that the Judge Ordinary, on the application of the landlord, will sequester the property on the farm, and appoint a person to take the necessary measures for sowing or reaping which the interest of all concerned may require; and the crop and stocking being attached and disposed of in so far as the landlord's right of hypothec extends, the lease will be declared forfeited, and the landlord's claim of damage will be ascertained and recovered from the effects of the tenant, according to the rules observable where a person dies leaving a property with which the heir declines to intromit.

3. *The proceedings for rendering the right of hypothec effectual.*—It is necessary to consider this branch of the subject in different views: And the variety of circumstances to which our attention is necessarily called, renders it so complicated, that I shall perhaps best attain my object by

presenting a kind of table* of the rights of the landlord, with the defences that may be pleaded, accompanied with explanatory observations, under the following arrangement.

I. OF THE LANDLORD'S RIGHT OF RETENTION.

I. *Currente termino.*

1. Over the crop.

1. *Where the rent is payable in Money.*

The landlord may oppose a pointing at the instance of a creditor of the tenant of the whole crop on hand, of whatever year's growth, in security of the current rent.

1. ANSWER by the Creditor.—Enough is on the farm to cover the current rent.

This is not a sufficient answer, the crop left may be destroyed, the cattle may die. *Crawford v. Stewart. Supra, p. 278.*

2. ANSWER by the Creditor.—He is willing to find caution, provided the rent and right of hypothec is assigned to him.

1. REPLY by the Landlord.—He is not bound to assign.

Found that a poinder offering security to the landlord has a right to insist for an assignation to the rent and hypothec. *Crawford ut Supra.*

2. REPLY.—The landlord has a right over the crop, &c. for arrears due to him.

Found that this is not sufficient, since the landlord has taken no steps to affect the subject for former arrears.

3. REPLY.—But part of these crops stand hypothecated for preceding years' rents,

* This Table is given precisely as it stood in the former editions of this book, although it seems to be in a great measure superseded by what has been said above, with regard to the landlord's right of hypothec. *Vide Supra, p. 275.*

I. OF THE LANDLORD'S RIGHT OF RETENTION.

being the rents of the years of which they are the crop.

As each crop stands hypothecated for the rent of that crop, this, it is thought, would be a sufficient answer as to crops of a crop the rent of which was still in arrear.

2. *Where the rent is payable in Grain.*

In this case, the offer made by the pawning creditor must be, not simply caution to pay the rent, but caution to deliver the precise grain stipulated by the lease. *Hall v. Nisbet, Supra*, p. 284.

3. *Over the stocking.*

The same right of retention of the stocking of the farm is competent against the creditors of the tenant, as in the case of the crop.

N. B. The landlord is entitled (*current termino*) to retain the crop and stocking against a purchaser, as well as against a creditor of the tenant's.

II. *After the term of payment.*

The difference between the landlord's right of retention after the term of payment, and that which he enjoys during the currency of the term, consists in this, That, as after the term of payment the landlord is at liberty to appropriate the subject of hypothec in payment of the rent, the creditor of the tenant is not bound to find caution to the landlord for the rent. It is only incumbent on him to leave sufficient on the ground to pay the hypothecated rents.

III. *Actions competent to the creditors of the tenant from the exercise of these powers.*

The power of retention given to the landlord, must be exercised with a due attention to the interests of the creditors of the

I. OF THE LANDLORD'S RIGHT OF RETENTION.

tenant. This is obvious from the statement given of the pleas of the parties; and without going very minutely into the causes on which an action would be sustained, at the instance of a creditor whom the landlord has excluded, by pleading his right of retention, it may be observed, that an action would be competent to the creditor;

1. Where the creditor's offer to find caution previous to the term of payment is refused.
2. Where a sale of cattle is interrupted by the landlord, and the cattle carried back to the farm.
3. Where the term of payment is past, and there is corn on the farm sufficient to cover the rent, after setting apart what is offered to be poulded by the creditor.

In these cases, were a poulding to be stoppt, an action would lie at the instance of the creditor against the landlord, for payment of the debt due by the tenant.

II. OF THE LANDLORD'S RIGHT OF BRINGING BACK THE SUBJECT OF THE HYPOTHEC.

I. The crop.

1. *Brevi manu.*

This may be done where the crop is sold, or where it is given in payment of a debt, provided it be done within twenty-four hours from the time at which the goods have been carried off. *Chrichton v. the Earl of Queensberry. Supra, p. 303.* But where the goods have been settled on the lands for more than twenty-four hours, this will not be competent. It will therefore be sufficient to defeat an attempt of this kind,

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if the creditor or purchaser can show that the corn has been settled on his grounds for more than twenty-four hours. *Supra*, p. 304.

In like manner, where a creditor has pointed and carried off the goods, the landlord cannot *via facti*, though within twenty-four hours, bring back the goods. *Currie v. Crawford, Supra*, p. 305.

2. By the aid of a Judge.

The recovery of the crop carried off by a purchaser or creditor, to the prejudice of the landlord, may be obtained by an application to the Judge Ordinary, after the landlord has by delay lost the right of carrying them back at his own hand, and this power will remain as long as the goods are in the custody of the purchaser or creditor; or the landlord may pursue for their price, and this includes not only the crop of the year, but the crop of former years in so far as the rent of these years remains due.*

* The landlord may by an action against the holder, not only recover the goods carried off, but even those persons who have assisted the tenant, in clandestinely carrying off the goods, will be exposed to a claim at the instance of the landlord. *Lord Salton v. Club*, 18th Nov. 1704. *Fount. Mor.* 1821, & 6224. *Supra*, p. 301.
 “ It came to be debated, in this case, whether the accomplices, who
 “ assisted Club to carry his goods and corn off the ground, to the
 “ prejudice of the master's hypothec, could be liable *in solidum*,
 “ or only *pro rata*, for the damage, where violent away-taking was
 “ not proved. But the Lords considered the intromission as un-
 “ warrantable; and although the benefit did not redound to them,
 “ yet it was a delinquency, *in suo genere et mali exempli*; and, if
 “ allowed, would encourage tenants to help their neighbours to de-
 “ fraud their master by clandestinely conveying their goods and
 “ corns off the ground; and if a master can vindicate his corns
 “ from a third party, *bona fide* bargaining for them, *multo magis*

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The defence competent to the holder consists in this, that when he carried off the property, the terms of payment were past, and there was enough of the crop left on the ground to answer the hypothec. *Hays v. Keith*, *Supra*, p. 285.

II. Of the stocking on the farm.

The same power of bringing back the cattle *brevi manu* is allowed, which takes place in the case of the crop; *Crichton v. the Earl of Queensberry*; *Supra*, p. 303, where the landlord was allowed, within the twenty-four hours, to drive back a flock of sheep.

But the stocking on the farm is in a different situation from the crop, in this respect, that the tenant has a power of administration, which entitles him to increase or diminish the stock, as circumstances may require. Hence, where cattle are sold, the landlord cannot demand them back from the purchasers. It is a sufficient answer for the purchaser to make, that the cattle were purchased from the tenant.

But where, in place of a fair sale, the cattle are given in payment of a debt, that transaction would not afford a sufficient answer to the creditor of the tenant, he would be obliged to restore them to the landlord.

A third defence may be founded on a poinding of the cattle; and on this point, Mr. Erskine says,
"As the tenant has not the same power of disposing of the cattle for the payment of debt
"as he has in the way of a proper sale, it is
"more doubtful, whether a creditor, who hath
"carried off the tenant's cattle by poinding,
"be secure against the landlord's action of recovery;" B. II. tit. vi. § 61. But it has been

"may he pursue those who assisted in abstracting them; and
"therefore they found all the assistants liable *in solidum* in this substantiated case."

III. THE MEANS BY WHICH THE RIGHT OF HYPOTHEC IS RENDERED EFFECTUAL.

since decided, (*M'Dowal v. Jamieson, Supra*, p. 292,) that the creditor attaches the property of his debtor *tantum et tali* as it stands, and, of course, affected in this case by the claim of hypothec. Here, as in the case of the crop, it is a sufficient answer to the action of the landlord, that there was sufficient left on the grounds after the term of payment of the rent.

The right of hypothec is rendered effectual to the landlord by sequestration, which is obtained on an application to the Judge Ordinary,* setting forth the arrears, and praying for a warrant to sequester the crop, &c. and for power to sell to the extent of the arrears. (*Dow v. Hay, Supra*, p. 283.) This application may be made, not only where there are arrears due, but wherever the landlord has reason to apprehend that the tenant is endeavouring to deprive him of his hypothec, by displenishing the farm, or where the credit of the tenant is suspected. (*Grant v. Skirris, Supra*, p. 283.)

The effect of the sequestration on the stocking, is to render special the landlord's right, which was before general, and to make it attach on each individual, of which the stock is composed, so as to entitle the landlord to recover the property, or the value of the cattle, into whose hands soever they may have gone : The regular issue of this application, is a roup and sale of the goods for payment of the landlord.

2. By an action against intromitters, with the sequestrated effects.

Actions at the instance of the landlord, may proceed either before or after sequestration has been obtained. When they take place before sequestration, in consequence of the crop or

* For this, and the other forms connected with this section, see Appendix III. No. 5.

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IS RENDERED EFFECTUAL.

stocking having been sold or carried off the farm, the pleas of the parties have already been taken notice off; but, where this action proceeds in consequence of the corns or cattle being carried off, after a sequestration has been awarded, the same defences will not lie: the goods are under the distribution of the Judge; and those who intrude with them otherwise than by his authority, will be found guilty of a spulzie. The prayer of the petition (as appears from the appendix, connected with this section) is, that the effects may be sequestered, for security of the year's rent. The Sheriff, on advising the petition, authorises the Clerk of Court to inventory the effects, and sequester them for security and payment of the rent. In consequence of this authority, the person appointed makes an inventory, and declares the articles in the inventory to stand sequestered for payment of the landlord; and he prohibits "the tenant and all others, his majesty's lieges, from meddling or intruding with all, or any part of the goods so sequestered, under whatever colour or pretext," with certification that they shall be prosecuted according to law. This act of sequestration is followed by a warrant to rouse the articles for payment of the landlord. But it is the act of sequestering the effects for the special purpose of securing the landlord, that creates a lien over them; and therefore, in an action at the instance of the landlord, for the value of the goods purchased or carried off after a sequestration, it would not be sufficient for the defender to say, That, at the time he received the goods, there were sufficient left behind to answer the landlord's claim; he would be obliged to show, that the landlord had actually received, or might still from the goods left receive, the amount of what was due to him.

4. *The means of security afforded to the landlord by the Act of Sederunt 1756.*—By the 5th sect. of the act, it is provided, that “ where a tenant
 “ shall run in arrear of one full year’s rent, or shall
 “ desert his possession, and leave it unlaboured at
 “ the usual time of labouring, in these, or either of
 “ these cases, it shall be lawful to the heritor, or
 “ other setter of the lands, to bring his action
 “ against the tenant before the Judge Ordinary,
 “ who is hereby empowered and required to de-
 “ cern and ordain the tenant to find caution for
 “ the arrears, and for payment of the rent, for
 “ the five crops following, or during the currency
 “ of the tack, if the tack is of a shorter endur-
 “ ance than five years, within a certain time to
 “ be limited by the Judge; and failing thereof,
 “ to decern the tenant summarily to remove, and
 “ to eject him in the same manner as if the tack
 “ were determined, and the tenant had been le-
 “ gally warned, in terms of the foressaid act 1555.”

In order to entitle the landlord to the benefit of this enactment, the first requisite is, that the tenant must have fallen in arrear of one full year’s rent.* But if it should happen that a year’s rent is due by a tenant at the time of the land-

* It may be proper to mention, that “ *a full year’s rent*,” is understood to mean an arrear to the amount of a year’s rent: if the last moiety, for example, of the year’s rent 1819, and the first of the year 1820, remain unpaid, they form an arrear of a full year’s rent. In the same manner the arrears of several years may be laid together to make up the arrear of a year’s rent. This is understood to have been decided in the case *Alexander v. ———*, 19th December 1811, *Not reported*.

lord's death, which year's rent becomes a debt due to the executor of the landlord; the heir of the landlord cannot found on the circumstance of the tenant's being due a year's rent to the executor of the former landlord, as the ground of an application to the Judge Ordinary, in terms of the Act of Sederunt. Before the landlord is entitled to apply for the benefit of the act, the year's rent must be due to himself.*

* Lord Elbank v. Hay, 19th January 1780. Fac. Coll. Mor. p. 13869. The landlord died in the month of August 1778, at which time one of his tenants was due more than a year's rent, to which the landlord's executor succeeded. In September following the landlord's heir raised an action against the tenant on the Act of Sederunt.

IN SUPPORT of this action, it was PLEADED for the pursuer; That, previous to the act 1756, to prove the bankruptcy of the tenant, and entitle the landlord to apply for a cautioner, it was necessary for him to attach the stocking, and then to apply for having him removed as a bankrupt, a procedure which exposed the parties to much litigation and inconvenience. It was to obviate this, that the falling into arrear for a year was rendered an act of bankruptcy on the part of the tenant, which entitled the landlord to apply to the Judge Ordinary, that he might order caution to be found. The division of the rent, on the death of the landlord, ought not, therefore, to defeat this salutary regulation; were it to have that effect, then, wherever a proprietor disposed his estate to his son, or assigned his rents to a third party, or where the rents are attached by legal diligence, a bankrupt tenant might retain possession, and be empowered to deteriorate the lands; yet, the Act of Sederunt had in view not merely the security of the landlord, it provided also for the cultivation of the ground, which a bankrupt tenant was held to be incapable of accomplishing. It may be true, that debts due to third parties are not considered; but, where a landlord can subsume that one year's arrear of rent has been incurred, both the words and spirit of the act support his application.

TO THIS IT WAS ANSWERED, That the hypothec secures the landlord for one year, and it is only when more than a year's rent is due that the interposition of the Judge becomes necessary for his security. Arrears of rent, when due to the landlord's executor, to

If at the term of the application there was a year's rent due, and, in the course of the proceedings, the landlord takes payment of part of the arrears, that will be a defence against the landlord's demand for a summary removing. In the case in which this point was fixed, the year's rent was due at the time of making the application; but the tenant having, within three days after the action was called, paid up the arrears, and received a discharge from the landlord, "The Court were unanimous, that, in a process upon the Act of Sederunt, the tenant can neither be decreed to remove, nor to find caution, unless a full year's rent be due at the date of the decree." But although full payment of arrears before decree is a good defence, the landlord is not obliged to accept of

his creditor or his assignee, cannot be ascertained in a question with the landlord alone; and, in this case, they are extraneous debts. It is on this account the Judge Ordinary is appointed to order the tenant to find caution for arrears and for payment of the rents of the five following crops, clearly taking it for granted, that the arrears are due to the same person to whom caution is to be found for the following crops:—On the same principle, it has been found, in an action for declaring an irritancy of a feu right, *propter non solutum canonem*, that a superior was not entitled to found on the arrears of feu-duty due to a third party, they being incurred before he had acquired the superiority. The Court found the application in these circumstances to be incompetent.

* *Campbell v. Robertson*, December 1763. Sel. Dec. No. 211. Mor. p. 13867. But if the tenant fails to find caution, and decree of removing has been pronounced in the Inferior Court, he will not be reponed on offering caution in terms of the Act of Sederunt, in a suspension of the decree of removing in the Court of Session. *Hunter v. Badenoch*, 18th November 1800. Fac. Coll. Mor. Appendix, *voce Removing*, No. 1. *Kinloch v. M'Comie*, 16th June 1812. Fac. Coll. and *Supra*, p. 185.

partial payments; and the debts of the landlord, or even the public burdens affecting the lands, paid by the tenant, without the authority of the landlord, will not be brought in *computo* to diminish the year's rent due by the tenant.*

In a later case, the arrears had been paid up previous to decree, though at the time of the application there was more than a year's rent due. The former cases seem at first to have been overlooked; for, the Lord Ordinary found, that the Act of Sederunt applied, "in respect, that at the commencement of the process a full year's rent was resting unpaid by the tenant." But the Court, on advising a reclaiming petition, "were of opinion, that to found a removing under the Act of Sederunt, the year's rent must be due when the decree is pronounced; Select Decisions, No. 211." It was at the same time observed, that the landlord is not obliged to accept of partial payments."†

* Carruthers v. M'Garroch, 19th January 1780. Fol. Dict. Vol. IV. p. 225. Mor. p. 13869.

† *Supra*, p. 430.

‡ Low v. Knowles, 5th July 1796. Fac. Coll. Mor. p. 13873. In this case, John Low held a lease of a farm, the rent of which was payable, one half on the 20th December, and the other on the 20th June, for the crop preceding. This lease was assigned to Knowles, who reaped the crop, and was liable for the rent 1793. On the 26th June 1794 Low applied to the Sheriff to sequester Knowles's effects, for payment of crop 1793 and crop 1794; and, on the same day, he instituted an action on the Act of Sederunt 1756. The sequestration was recalled, on caution being found for the rents 1793 and 1794; but the action on the Act of Sederunt proceeded. In February 1795, a decree of removing was pronounced.

Where a tenant is due, not only a year's rent; but is bound to perform certain prestations, or to pay damages, it is to liquid annual payments alone, and not to illiquid prestations; that the Act of Sederunt applies.*

ced on the Act of Sederunt, at which time Low had received the rent of crop 1793; so that the first half of crop 1794, due on the 20th December preceding, was alone due, and this, as well as the other half, due on the 20th June 1795, was paid in October that year by the cautioner for Knowles. On these circumstances, it was argued for the landlord, that the act gives the heritor a right to insist for arrears in general terms, without making any exception on his afterwards paying up the arrears; and a contrary doctrine would destroy the effect of the act, as a bankrupt tenant might contrive, by a partial payment; to get rid of the application, when he could not find caution. The tenant maintained, that the caution found in the sequestration, as well as the payment by the cautioner, must, in this case, prevent the operation of the act. Such was the argument on which the Court refused to decern in the removing; and it will be particularly remarked, that the Judges declared their opinion to be, that the landlord is not obliged to accept of partial payments.

* The Earl and Countess of Morton v. Murray; 26th February 1793. Fac. Coll. Mor. p. 13872. In this case, the Earl and Countess of Morton brought an action before the Sheriff, in which, after specifying the sum due as the arrears of money-rent and conversion of kail, the summons concluded, that the tenant should be decerned to remove, or to find caution, &c. The Sheriff decerned in the removing, and a bill of suspension was passed, on condition of the tenant's finding caution for the whole arrears, and the rents "for the five subsequent years." The tenant's cautioners were taken bound, not only for the arrears, and for the rent of the five subsequent crops, but "for whatever sums may be awarded, in name of damages and violent profits, and such other sum or sums of money as the tenant should be found liable in, to the charger (the landlord), in case it shall be found by the Lords of Council and Session, after discussing the suspension to be expedite hereupon, that the tenant ought so to do." The landlord afterwards brought an action against the tenant and his cautioners,

To entitle the landlord, therefore, to the benefit of the Act of Sederunt, 1. There must be a full year's rent due at the time of making the application; 2. The year's rent necessary to found the application must be due to the landlord. It is not sufficient that a year's rent is due to a different person; as, for example, to the executor of the landlord's predecessor, or to an assignee, where the rent has been assigned by the landlord. 3. It may be doubted, whether the effect of legal diligence for attaching the rents does not leave such an interest in the landlord, as will support him in an application, even where the year's rent is so attached. 4. The year's rent must remain due at the time of decerning in the removing: hence a payment to account of the year's rent puts an end to the application, and caution cannot be demanded: but the landlord is not obliged to accept of less than the full arrears, nor will the tenant be allowed to pay debts of the landlord's, or even public burdens affecting the farm, in order to diminish the arrears. 5. In computing the year's rent, the conversion of kain is admitted to form a part, but illiquid prestations are not; and, there-

for the non-performance of certain prestations, relating to the inclosures. The Court found (though at first they were of a different opinion), " that the petitioner's bond of cautionary extends only " to the rents and arrears of rents, and conversion of kain, specified " in the libel of removing before the Sheriff, and decree thereon. " It was at the same time observed, by some of the Judges, that, " independent of the terms of the libel and decree, the Act of Sederunt applies only to liquid annual payments, and not to illiquid " prestations."

fore, the caution under the Act of Sederunt will be restricted to the money-rent and conversion for kains.^a

5. *The proceedings in the landlord's baron court.*—Where lands were erected in *liberam baroniam*, the baron anciently possessed a considerable criminal as well as civil jurisdiction, which by an infestment "*cum curiis*" or "*cum curiis et bloodwitis*," he might have conveyed to his vassal; his charter being considered in this respect as the constitution of an heritable bailiary in favour of the vassal, which gave him a cumulative jurisdiction with the baron. Even the heritor holding of the Crown, though his lands were not erected into a barony, possessed a right of holding courts with very extensive powers.^b

The power thus enjoyed by the baron was restricted by the act 20th Geo. II. c. 43. The jurisdiction of those barons whose lands were at that time erected into a barony, was declared, in regard to criminal jurisdiction, not to entitle them to judge in any trial upon a penal statute, nor in any other criminal matter, except in assaults, batteries, and smaller offences, which may be punished, either by a fine not exceeding 20s. Sterling, or by setting the delinquent in the stocks in the day-time, not exceeding three hours.—The fine to be levied by poinding the delinquent's goods, and in

^a The forms of the application and bond of caution will be found in the Appendix III. No. 6.

^b *Stewart v. Westnisbet*, 30th January 1622. Durie. Mor. p. 7299.

default of these, by imprisonment for one month at farthest. But the exercise of this criminal jurisdiction is burdened with the appointment of a prison, so constructed and situated, as not to be prejudicial to health, and with a grate open to inspection from without; it is ordered to be described in a book kept by the Sheriff-clerk, and it must be inspected by the Sheriff; the baron must imprison no where else under a penalty of £20 Sterling with costs, and the imprisonment must proceed on a written order to his officer, expressing the cause for which the delinquent is imprisoned, and extracts of these orders must be reported to the Sheriff every six months. The observance of these, are such burdens on the criminal jurisdiction of the baron, that few or none are willing to exercise it. The civil jurisdiction of these barons is reduced to the right of recovering the rent and feu-duties due by their tenants and vassals, and of compelling them to perform the services due to the baron or to his mill. In other civil actions, his jurisdiction is restricted to the case where the debt and damages do not exceed 40s. Sterling; and beyond this no prorogation of his jurisdiction is allowed.*

This is the state of those baronies which were in existence prior to the act 20th Geo. II. c. 43; and it is declared, that all baronies, to be erected afterwards, shall confer no higher jurisdiction than that for recovering the rents of

* Ersk. Inst. B. I. tit. iv. § 28.

lands, multures, and mill-services: and, as Mr. Erskine observes, this, "in proper speech, makes "no jurisdiction, but is a right which was always understood by our former law to be inherent in every landholder, though neither baron nor infest *cum curiis*, and which he indeed enjoys at this day."^a Thus the old barons enjoy a criminal jurisdiction, so much incumbered with regulations, that it is never exercised, and a civil jurisdiction to the extent of £2 Sterling; while those whose lands have, since the act, been erected into a barony, and perhaps even those who hold of the Crown without any erection into a barony, enjoy, in common with the old barons, the privilege of pursuing their tenants and vassals for rents and feu-duties, and for mill-services.

This power is exercised by the appointment of a bailie; and it is only by pointing that the decree of the Judge can be carried into effect.^b

PREScription OF RENTS.

THERE is a quinquennial prescription of rents introduced by the act .1669, c. 9, which "statutes and ordains, that mails and duties of tenants, not being pursued within *five years* after the tenant shall remove from the lands for which the mails and duties are craved, shall prescribe in all time coming, except the mails and duties shall be offered to be proved to be due and rest-

^a Ersk. Inst. B. I. tit. iv. § 29.

^b The constitution of Baron Courts, and the form of their proceedings, will be found in the Appendix III. No. 7.

"ing owing by the defenders, their oaths, or by a
 "special writ under their hands, acknowledging
 "what is resting owing."

The defence of prescription, however, is one which will seldom occur, since it is only where the tenant removes from the farm that the prescription is pleadable: the words are, "not being pursued within five years after the tenant shall remove from the lands;" and it certainly will very rarely happen that arrears of rent will, under such circumstances, be allowed to remain due without some voucher or document being taken. It might be thought that the same consequences which follow on the tenant's removal, ought also to take place where the connection between the landlord and tenant is broken, by the landlord disposing of his interest in the lands; and that, by the lapse of five years from the time of selling the estate, the landlord's claim for the rent should be exposed to the plea of prescription. This ought more especially to be the rule, if the prescription was introduced, as Mr. Erskine says, in order to save the tenant from demands for rents which have been paid, although the tenant, through ignorance of business, may have neglected to preserve the receipts;* for this reason applies as well

* Ersk. Inst. Book III. tit. vii. § 20. "This prescription (says Mr. Erskine) was introduced solely in favour of tenants, natural possessors of the lands, who, from their rusticity or ignorance in business, ought not to be overtaken, though they should not be exact in preserving their receipts and acquittances for any considerable time after they are granted, and so is not to be extended to such tenants as cannot justly plead the same ignorance or

to the case where the landlord has ceased to have any interest in the land, as to that where the tenant has left it. But the contrary seems to be the law; for according to Kilkerran, "the five years' prescription of mails and duties, after the tenant's removal, does not take place against a heritor though he have sold his land, and that the purchaser has been five years in possession, the tenant still remaining on the ground."^a The terms of the act, therefore, are the rule; and the tenant must have left his possession for five years before he is entitled to plead the prescription established by this statute.^b

It must be obvious, that in a prescription of this kind, founded on a presumed payment, the vouchers of which have not been preserved, a proof of partial payments, within the period of the five years after the tenant has left the farm, can never be allowed to interrupt the prescription; these payments, on the contrary, are circumstances which go to support the legal presumption of payment;

"rusticity: on this ground, action was sustained for the arrears of rent backwards for 40 years, at the suit of a liferenter against a fiar to whom she had granted a lease of all her liferent lands, and who was not like a common tenant admitted to plead the quinquennial prescription. *Murray*, 9th December 1709. (Mor. p. 11054.) In the same manner, a tack of a whole estate, containing a power of removing tenants, is not deemed a tack of such a nature as was intended to fall under the statute. *L. Carfin*, 20th July 1733," *Not reported*.

^a *Strahorn v. Cunningham*, 19th June 1739. *Kilk.* p. 415, *Mor.* p. 11059.

^b See the case of *Duff v. Innes*, 7th March 1771. *Fac. Coll.* *Mor.* p. 11059, where this prescription was found to be pleadable by the cautioner for a tenant,

and on that account, they have been held to afford no answer to the plea of prescription.*

SECT. IV.

ACTIONS OF REMOVING.

WHEN we revert to the state of this country in old times, and consider the connection which subsisted between the landlord and tenant; when we look to the form of the ancient lease, which presumed, that no tenant ever removed, since it bound only the landlord to give him possession, we shall discover that the manners and opinions of the times had given to the tenant a right nearly approaching to that of property,^b and one which in few cases would be infringed by any one

* *Nisbet v. Baikie*, 10th July 1729. *Fol. Dict. Vol. III. p. 117. Mor. p. 11059.* In this case, it was also found, that tacks of mails and duties do not fall under the act, which applies to those tenants only who are in the natural possession by labouring the ground.

^b Craig describes the tenant as struggling to retain possession, "*ne nativis sedibus quas ipsi et parentes eorum diutissime possederant, in quo nati consenuerunt, pellantur.*" This accounts for those violent removings which disgraced the Police of this country. The act 1546, c. 2, presents a picture of the disorders which took place immediately before the enactment 1555, (which for so long a time regulated the removing of tenants); and whatever defects the plan of that statute may now seem to have, we learn from the situation in which matters then were, and from the improvements which that act introduced, to consider it as a most important acquisition to the country.

except the landlord, to whom ingratitude, or a neglect of his interests, would perhaps be more than sufficient reasons for removing the tenant from his possession.

When, in the progress of society, the ancient connexions, by which the landlord and tenant were bound to each other, were broken, views of a very different kind presented themselves, and property in land, which had been formerly used for the purpose of procuring followers and dependants to the proprietor, became the object of commerce, and was converted to its proper use.

In the first dawns of such a change, when those, who had looked with confidence to the continuance of a possession which their ancestors had enjoyed for ages, were in danger of being dispossessed, we need not be surprised that a rude and warlike people should have resorted to arms for the defence of what they conceived to be their rights,* or that combinations should have

* The act 1546 is a ratification of an act passed only a few weeks before :—" The whilk day, the Lord Governor, with advice
 " of the Queen's grace and Lords of Council, understandand that
 " there is great convocationes made in the realm, for putting and
 " laying men forth of their take, and steadings, and sicklike, to resist to the lordes of the ground, their bailies and officiares, to lay
 " them forth ; quilk is occasion of great trouble and slaughter
 " amengst our Sovereign Ladies Lieges. Therefore it is statute and
 " ordained, that letters be directed to all Sheriffs, Stewarts, Bailies,
 " and to their deputes, and to other officiares of the Queen's Sheriffs in that part, to pass to the market cross of the head burrows
 " of the shires, and there, be open proclamation, command and
 " charge all and sundrie our Sovereign Ladies Lieges, of whatsom-
 " ever degree they be, that none of them take on hand to make
 " any convocation for putting and laying furth of any tenants, bot

been formed which led to commotions and bloodshed.

Such was indeed the state of matters, when the act 1555, c. 39, was framed: our writers have considered it as introducing the written precept of warning. But this opinion has been well and successfully combated by the late Mr. Ross, in his discourse on the removing of tenants. He there shows, that the written precept was not introduced, but regulated by the act; and contends, with much ingenuity and great force of reason, that this enactment has not been well understood in our Courts, and that the practice which has followed upon it has widely diverged from that which it was the object of the legislature to introduce.*

“ that they, be their bailies and officiares, lay furth the said tenant's goods orderly, conform to the laws of the realm, observed and kept in time bygone: Nor zit that na manner of tennents make ony convocation or gathering, for resistance to the lordes of the ground, their bailies, officiares, under the pains contained in the acts of Parliament made against them that makis ony gadderings, or convocations, with certification to them that does on the contrarie, that they sall be called at particular diets, and sall be punished therefore with all rigour, as accordis. And gif ony person thinkes them offended be outhers, ordains, That they sall be called outhir criminally or civilly, and justice sall be administered as accordis.”

* See *Ross on the Removing of Tenants*, a tract which shows much acuteness and great critical powers, while it proves the author's intimate acquaintance with the ancient laws and customs of the kingdom; the subject, however, as now understood in practice, is too simple, and too much settled, to render this valuable tract interesting to practitioners: But it will remain a proof of the author's genius and research, and a guide to the study of this part of our ancient law. It is impossible to peruse this part of Mr. Ross's Lectures, without regretting, that he should not have had an opportunity of presenting the whole of his valuable lectures to the public, with

But this is in truth a speculative point rather than a matter of practical utility, since it is of more importance to have a rule of this kind precise and fixed, than to have it consistent with the original views of the Legislature, at the expense of unsettling received opinions.

The statute 1555 certainly was productive of great improvement in this department; and instead of those violent and disgraceful tumults which formerly disturbed the public peace, the business was brought under the cognizance of the Judge; and for two centuries it continued to operate beneficially for the country.

The forms of the warning, which were numerous, prepared the way (in case of the tenant's refusing to remove) for an action of removing, while their variety and nicety often afforded a defence to the tenant, which defeated the object of the landlord, or increased his expense; till at last those forms, which had been so highly valued as affording a protection from riot and disorder, became, in a better state of society, an intolerable grievance. The Court, swayed by the consequences produced by the forms of the old statute, were desirous of freeing the country from a rule of practice so ruinous to all parties; and by the Act of Sederunt, 14th December 1756, they reduced this matter to a great degree of simplicity.

The forms of the warning were dispensed with, and the institution of an action before the Judge

those last corrections, which would have given them a lucid order, and a form even more interesting than they at present possess.

Ordinary, forty days before Whitsunday, was declared to have all the effect that had formerly been given to the proceedings under the act 1555; and where the tenant had become bound on his lease to remove, letters of horning were authorised, which being executed forty days before Whitsunday, became, under the Act of Sederunt, a warrant for ejecting the tenant.

Nothing can be more efficacious than the forms which were thus introduced; and it is only necessary to turn to the recital on which the act proceeds, to discover how much we are indebted to the Court for this enactment. The act states, "That where-
" as the difficulties that have occurred in actions
" of removings from lands, have been found high-
" ly prejudicial to agriculture, and both to mas-
" ters and tenants, in respect, that during the de-
" pendence of such actions, the lands are neglect-
" ed and deteriorated by the defender, and the
" heritor's security for his rent brought into dan-
" ger, and tenants are discouraged from entering
" into tacks by the uncertainty of attaining to
" possession, and by their finding the subject of
" their tack much deteriorate during the depend-
" ence of the process of removing against the pre-
" ceding tenant." Certainly a regulation, by which consequences so destructive to agriculture, were to be avoided, is of the first importance, yet it is one which has not, upon all occasions, met with unqualified approbation.

Before proceeding to state the defences competent against this action, arising from the state of the pursuer's title, or the situation of the de-

fender, I shall offer a few remarks on what may be considered as peculiar to these different forms, since even those under the act 1555 (although almost superseded in practice by the preferable forms of the Act of Sederunt) have never been discharged, and may still be used.

FORM OF REMOVING UNDER THE ACT 1555.*

THE form of the warning, of the execution, and of the action, will be found in Appendix III. No. 8, and I mean only to take notice here of a few particulars, explanatory of the practice which has followed on the statute 1555.

The Precept.

THE first step under the act, is to give warning to the tenant. This is done by a precept, in the name of the landlord, and is meant to break the connexion that has subsisted between him and the tenant; should the tenant disregard the warning, it becomes the foundation of an action before the Judge Ordinary.

A title is requisite to authorise a person to grant the precept: the granter of the lease, whatever be the nature of his title, in a question with third parties claiming the land, has a title perfectly unchallengeable, in all questions with his

* See Append. III. No. 8, where this act is quoted.

own tenant.^a Where again, the warning is made by any other than the granter of the lease, he must be possessed of a title; as in the case of a disponee, who must have a sasine vesting in his person the right to the subject of the lease before he can grant the precept.^b An heir also must be infeft,^c but a distinction is made in his favour; and where he is served and infeft before the action of removing is raised, the removing will be sustained, though he had, at the time of granting the precept, no other character than that of apparent heir, and even where the service only had taken place before, though the sasine had not followed till after the term:^d but, although, a service will produce this effect, a precept of *clare constat* will not;

^a Stair Inst. B. II. tit. ix. § 41. Ersk. Inst. B. II. tit. vi. § 51. In all questions between the granter of the lease and the lessee, it is quite obvious that the latter cannot be allowed to object to his author's title, however imperfect it may be. The lessee's title, never can be better than that of the lessor from whom it was derived; and whatever may be its effect in questions with third parties, it must always be sufficient to entitle him to remove his own tenant who has no title of possession at all, except through him. In all questions about leases, the presumption is, that the lessor had a sufficient title in his person, unless the contrary appears; and the lessee has no right to call for production of the title of the landlord, merely to satisfy himself that the lease is good. See this question decided in one of the branches of the case, *Denniston, M'Nayr, & Co. v. M'Farlane*, 16th February 1808. Fac. Coll. Mor. Appendix voce Tack, No. 15.

^b *Paxton v. Hunter*, February 1741. Kilk. p. 581. Mor. p. 16121.

^c *Paton v. M'Intosh*, 15th December 1757. Fac. Coll. Mor. p. 13806. *Sutherland v. Graham*, 3d August 1759. Fac. Coll. Mor. p. 5276. Ersk. Book II. tit. vi. § 51.

^d *M'Math v. Hewat*, 18th February 1606. Haddington. Mor. p. 13265.

for the Court held, that the sasine in that case could not be held to validate the previous precept of warning, though that might be the consequence where the sasine proceeded on a service;^a and, indeed, a sasine on a precept of *clare constat* will be good in any case, only where the predecessor has been in possession.^b It must be observed, however, that although a sasine on a service, where the service has preceded the warning, will be good, yet if the sasine be long delayed, it will not be sustained.^c In the case of common property, all those having a joint interest must unite in granting the precept: As, 1. Joint proprietors;^d 2. Co-heiresses; 3. The heir and the widow (previous to her being kened to her terce, and her share set apart). The husband's right of courtesy, and the widow's terce, afford a sufficient title, by referring back to the infestments on which these rights stand. Lastly, Tenants possess a right of removing those in possession of the ground: 1. Where their leases give them a power of outputting and inputting tenants;

^a Elphinstone v. Guthrie, 20th January 1625. Spottiswood, voce Removing. Mor. p. 13270.

^b Drumquhassel v. Cleland, 17th July 1628. Durie. Mor. p. 13274: Stair Inst. B. II. tit. ix. § 41.

^c Tenant v. Auchinleck, 26th June 1627. Spottiswood. Mor. p. 13272.

^d Bruce v. Hunter and Leisk, 16th November 1808. Fac. Coll. In this case it was found, that one of two common proprietors of an island had no title to pursue an action of removing without the concurrence of the other proprietor, although in this case the pursuer of the removing was proprietor of almost the whole island; the share of the other proprietor being equal to about 1-71 part of the whole. See also Stair's Inst. B. II. tit. ix. § 43, and Ersk. B. II. tit. vi. § 53.

given only on the 5th of April, which
 forty free days before Whitsunday,
 act.—The answer was, that,
 execution, there were forty free
 repelled the defence.^a Prac-
 act, so that the intimation
 fore the Whitsunday of
 is to expire;^b and,
 noval is Candlemas,
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 rning on the
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 warning, accord-
 ainly proceed on the
 as where he is resident on
 ay difference is, that the action
 must have the *induciae* required by
 ere the defender is abroad;^d yet practice
 introduced a warning of sixty days, proceeding

EXECUTION OF THE PRECEPT.
 lease is a life-rent lease; S. Where
 endurance, than for 19 years;
 years gives no such authority.
 kept in view, that there
 action between a fir-
 etc, resting on a
 right to pass.
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^a The Duchess of Buccleugh v. Davidson, 8th February 1715. Bruce. Mor. p. 13836.

^b Fowlis, 8th July 1626. Durie. Mor. p. 13855. Inglis v. Tenants, 16th December 1628. Durie. Mor. p. 13856.

^c M'Naughton v. Wilson, 14th February 1765. Fac. Coll. Mor. p. 13857. See also Gordon v. Burnet, 25th February 1783. Fac. Coll. Mor. p. 13859, in which the same principle was applied to a removing from a fishing, where the term of removal was Andersmas (30th November), the usual term of entry to fishings.

^d Falldounsides v. Bennerside, 11th January 1622. Durie. Mor. p. 13860. See also, Lee v. Porteous, 17th July 1630. Mor. p. 2182. M'Brair v. Crichton, 20th February 1666. Stair. Mor. p. 13861.

the church-yard door, where the church was surrounded by a wall, has been held to be a full compliance with the directions of the act.^a

Days of Warning.

THE act directs the warning to be given forty days before Whitsunday;^b and according to Craig there must be forty free days, exclusive of the term day, and the day on which the warning is given.^c Mr. Erskine follows this authority; and yet, where an objection was stated to a warning, that

^a Campbell v. Johnston, 1st March 1793. Fac. Coll. Mor. p. 13849. Where a farm is let to joint tenants, who are to possess distinct portions of it, although one of them have possessed the whole, the precept must warn both of them; for in every act intended to bring a lease to a close, it is proper to call all the parties who are named as tenants in the deed. M'Donald v. M'Donald, 23d May 1807. *Not reported.*

It is necessary to warn the infant heir of a deceased tenant. It is not sufficient to warn the person who is in possession for the pupil's behoof. Grant and Tutors v. Grant, 18th December 1733. Fac. Coll. Mor. p. 13841.

A precept of warning, executed blank in the tenant's name, was found to be null. Gordon v. the Duke of Gordon, 3d November 1737. Elchies *voce Removing*, No. 2.

See as to the warning of assignees and sub-tenants, *infra*.

^b The act 1690, c. 39, "on account of the inconvenience arising from the uncertainty of the term of Whitsunday," statutes and ordains, "that the Summer and Winter terms shall, in all time coming, be the 15th day of May, and Martinmas; and that the legal term of removing both in burgh and landward, shall be the said 15th day of May, upon warning forty days preceding the same."

^c Quadraginta hi dies integri esse debent, in quibus nec dies denunciationis, nec is in quem denunciatus est, numerabuntur. Craig, Lib. ii. Deig. 9. § 2.

it had been given only on the 5th of April, which did not leave forty free days before Whitsunday, as required by the act.—The answer was, that, counting the day of execution, there were forty free days; and the Court repelled the defence.^a Practice has explained the act, so that the intimation must be made forty days before the Whitsunday of the year in which the lease is to expire;^b and, therefore, where the term of removal is Candlemas, the warning must be given forty days before the Whitsunday preceding.^c The warning on the heritor's precept is not to be confounded with the execution of a summons; and therefore, where the tenant is out of the kingdom, the warning, according to principle, may certainly proceed on the same number of days as where he is resident on the lands; the only difference is, that the action of removing must have the *induciae* required by law, where the defender is abroad;^d yet practice has introduced a warning of sixty days, proceeding

^a The Duchess of Buccleugh v. Davidson, 8th February 1715. Bruce. Mor. p. 13836.

^b Fowlis, 8th July 1626. Durie. Mor. p. 13855. Inglis v. Tenants, 16th December 1628. Durie. Mor. p. 13856.

^c M'Naughton v. Wilson, 14th February 1765. Fac. Coll. Mor. p. 13857. See also Gordon v. Burnet, 26th February 1783. Fac. Coll. Mor. p. 13859, in which the same principle was applied to a removing from a fishing, where the term of removal was Andersmas (30th November), the usual term of entry to fishings.

^d Falldounside v. Bennerside, 11th January 1622. Durie. Mor. p. 13860. See also, Lee v. Porteous, 17th July 1630. Mor. p. 2192. M'Brair v. Crichton, 20th February 1666. Stair. Mor. p. 13861.

on a supplement, of which there is an example in the Appendix.

Term of Removal.

THE terms of removal ought to be precisely expressed in the precept, as well as in the action of removing; how far an error in that particular might defeat the action, would probably depend on circumstances. It has been held to be a fatal objection, that the precept warned the tenant to remove at Whitsunday instead of Martinmas, where Martinmas was the term of removal in the tack.^a But where the tenant was warned to remove *at the separation of the crop* in place of at Martinmas, which was the term of removal in the tack, the Court held the warning to be sufficiently precise.^b The conclusion seems to be, that where there is a mistake of one term for another, the warning is ineffectual; but where the error is trivial, as, for example, where *the separation of the crop* is substituted for a term at which the separation has usually taken place, and where the tenant can suffer no injury, either the error will be disregarded, or the pursuer will be allowed to amend the libel.

^a Earl of March v. Dowie, 6th March 1754. Fac. Coll. Mor. p. 13843. Campbell v. Buchanans, 11th Feb. 1780. Folio Dict. Vol. IV. p. 223. Mor. p. 13843.

^b Campbell v. Johnston, 1st March 1793. Fac. Coll. Mor. p. 13849.

The action which follows on the warning is generally brought before the Judge Ordinary; and where decree of removing is pronounced, the Sheriff may proceed to eject the tenant without the necessity of any charge upon the decree.^a There is a distinction, however, between the decrees of inferior Judges and the decrees of the Court of Session; for, although a Sheriff may proceed to eject after decree, without a charge, and even before extract, an extract and a charge are necessary upon all decrees of removing pronounced by the Court of Session.^b

FORM OF REMOVING UNDER THE ACT OF
SEDERUNT, 14TH DECEMBER 1756.^c

THIS act provides for the case of a tenant who is bound to remove by an obligation in his lease,

^a *Stainhill v. Burd*, 30th June 1675. *Stair. Mor.* p. 10513, and 13894.

^b *Pringle v. the Earl of Home*, 18th July 1739. *Elchies voce Ejection*, No. I, and *Removing*, No. IV. *Notes*, p. 119. *Kilk.* p. 480. *Mor.* p. 13894. In this case, according to Kilkerran, the landlord had, on a decree of removing of the Sheriff, and even before the decree was extracted, ejected the tenant, without a previous charge. Kilkerran adds, that, "our old lawyers, Balfour and Hope, seem to agree, that by the practice in their time, a charge upon the decree of removing must have preceded the precept of ejection; but, as Sir George M'Kenzie observes, a charge is now necessary only upon decrees of removing pronounced by the Lords, but not upon decrees of removing before inferior courts, which also are in use to issue their precepts, without putting the parties to extract. How this change in the practice of removings, upon inferior decrees, came about, is not known; but that decrees of the Lords still require a charge is plain, for the Lords never execute their own decrees as Sheriffs do."

^c See Appendix III. where the Act of Sederunt is fully quoted.

as well as for the case where there is no such obligation. These cases shall be considered in their order.

Where the tenant is bound by his tack to remove.—In this case, the Act of Sederunt provides, that it shall be lawful for the heritor to obtain letters of horning on the tack, and thereupon to charge the tenant with horning, forty days preceding the term of Whitsunday in the year in which the tack is to expire, or forty days preceding any other term of Whitsunday thereafter; and, upon production to the Judge Ordinary, of the tack and charge of horning, duly executed, he is required to eject the tenant, within six days after the term of removal in the tack.

Where a tenant has become bound by his lease to remove at a certain term, this regulation certainly is of service, in so far as it furnishes an easy method of removing the tenant; but it may be proper also to consider what the rule would be independently of the Act of Sederunt.

Craig is of opinion, that, in such a case, there is no occasion to resort to a warning under the act 1555; but that the tenant, having bound himself to remove, may be compelled to remove, as he may be compelled to perform any other legal obligation which he may have undertaken;* and according to Stair, "Summary removing is compe-

* Craig. L. II. Deig. 9, § 11. Incidere etiam solent casus, ubi denunciatio necessaria non est in his migrationibus; veluti, si pactum intercesserit, vel stipulatio de migrando ad certum tempus vel si certus dies præstitutus sit in locatione, quo colonus vacuam possessionem domini suo debet restituere: nam eo casu dominus, non

“tent, *ex pacto*, even against tenants, if, by their
 “tack, they be obliged to remove at the ish
 “thereof, without warning. But if they be not
 “removed precisely at that time, by an antece-
 “dent charge of horning, they are understood to
 “be continued by tacit relocation, and therefore
 “must be warned, ere they can be removed.”

The doctrine of Craig and Stair agrees with the older practice; and from several of the earliest decisions of the Court, it appears, that where there was a specific obligation in the tack to remove without warning, the landlord might eject the tenant on the term day, without any previous notice, and even *brevi manu*.^b But the decisions immediately before the date of the Act of Sederunt point at a different rule; and both at that time, and since, in cases where the Act of Sederunt is not followed, the understanding seems to be, that some sort of intimation to the tenant is necessary. Forty days is the time, which, on more occasions than one, the Court thought might be held as a reasonable notice. Besides, it has been long perfectly understood, that the landlord has not the power of *brevi manu* ejectment, but that, whatever be the terms of the obligation, the landlord must apply for the interposition of a judge.^c

denunciatione, sed iudicio legitimo, cogere debet colonum, ut mi-
 gret ex conventionione.

^a Stair. Inst. B. IV. tit. xxvii. § 14.

^b Freeland v. Monteith, November 1586. Colvil. Mor. p. 13877. Dewar v. the Countess of Murray, 18th December 1661. Stair and Gilmour. Mor. p. 1816 and 13879.

^c Dickson v. Tweedie and others, 18th February 1736. Clk. Hume. Mor. p. 13980. In this case, the tenants had become

It is not certain, however, that at the date of passing the Act of Sederunt, an obligation in the

bound "to remove at the expiration of the tack (Whitsunday 1735), without any warning or legal intimation made to them, or "process of law against them;" and, on this tack, a horning was raised and executed against the tenant on the term day, that is, on the 15th May 1735. The objections pleaded for the tenant were, 1. That there was no warning, though the act 1555 was general, and meant to guard every tenant from oppression: 2. That the charge to remove against the term of Whitsunday next, given on the 15th May, must mean the term of Whitsunday 1736. The answers for the landlord were, 1st, That, where the tenant is bound to remove without warning or intimation, it is impossible that the neglecting to use the warning can imply a renewal of the lease: 2. The letters of horning refer to the tack, which binds the tenant to remove at Whitsunday 1735, and the will of the letters commands the tenant to remove, in terms of the lease; and, therefore, the charge given on it can mean nothing else than a charge to remove at Whitsunday 1735. "The Lords found the letters ordered by proceeded, superseding execution till Whitsunday next, and "without violent profits;" that is, the Court superseded the removal till Whitsunday 1736.—This is certainly a very anomalous decision; and although Mr. Erskine considers it as an authority in support of the opinions of Craig and Stair; yet it seems hardly reducible to any principle whatever. It was at that time a settled point, that the tenant must either be removed at the term specified in his obligation, or, if he was not then removed, a warning in the common form was the only means of removing him; consequently, this tenant ought to have been removed at Whitsunday 1735, or he ought not to have been removed at all under this charge, leaving the landlord to take the means of removing him by warning, which law and custom prescribed. In the case of *Bartlet v. Stewart*, 2d December 1742; Clk. Hume and Kilk. p. 481; Mor. p. 13882; the tenant had become bound to remove at Whitsunday 1740, and the landlord had set the farm to a new tenant, whose possession was to commence at Whitsunday 1740; and the Court had to consider the effect of a clause of this kind, where no steps whatever had been taken to intimate to the tenant that he must implement his obligation at the stipulated time. Lord Kilkerran says, that it was "argued amongst the Lords what should "be the effect of such a clause; and it was agreed, that though a "formal warning was not requisite, yet still some notice or intimation to the tenant was necessary, in time for the tenant's provid-

Lease to remove without warning would not have authorised a charge of horning on the lease; and, had it been given six days before the term, the diligence might have been followed out, and the landlord might either have imprisoned the tenant for not implementing the charge, or have brought an action of removing, in which the tenant would have been decreed to remove.

It was to obviate these and other doubts and inconveniencies that the Act of Sederunt was passed. The act provides, 1. That a lease containing an obligation on the tenant to remove may be the warrant of a charge to remove, to be given forty days preceding the term of Whitsunday, in the year in which the lease is to expire; and this charge being neglected by the tenant, the Judge Ordinary is directed to interpose his authority, and six days after the term to eject the tenant. 2. Where the tenant has not been removed at

“ing himself, which, in common cases, probably might be thought
 “to be forty days before the term, though that was not spoke to. It
 “seemed also to be thought, that if once the precise term passed,
 “at which, by the tack, the removal is agreed to be without warn-
 “ing, without the granter taking the benefit thereof, the clause
 “would have no more effect; for that the obligation would not con-
 “tinue with respect to every subsequent term. But this received
 “no judgment:—it was only in general found, that in regard no in-
 “timation was made to Provost Stewart to remove at Whitsunday
 “1740, he was in *bona fide* to intromit with the rent of crop 1740.”
 See also the opinion of the Court as expressed in the case of the
 Earl of Eglinton *v.* Fulton, 24th January 1771. Fac. Coll. Mor.
 p. 13886. “It was observed, by very high authority from the
 “Bench, that Lord Stair’s notification of forty days being necessary,
 “even where a tenant was bound to remove without warning, was
 “right, and in the abstract case should be followed.”

the term of removal mentioned in the lease, but is possessing by tacit relocation, the Act of Sederunt declares that a charge may be given to the tenant forty days before any future term of Whitsunday, provided he is charged to remove at the terms fixed in the lease. This provision of the act is attended with considerable advantages to the landlord; for, according to the former practice, where there was an obligation to remove without warning, unless it was enforced at the precise term stipulated in the lease, it was necessary for the landlord to resort to the form of warning prescribed by the act 1555.*

* Mr. Erskine, B. II. tit. vi. § 50, after mentioning the provisions of the Act of Sederunt, says, that "if the landlord shall suffer a tenant, who is bound by a clause of this kind, to possess longer than the term expressed in his tack, the paction to remove without warning is no longer of force, and consequently the tenant possesses from that time by tacit relocation." But this means nothing more, than that the clause of itself, without a charge, will not put an end to the lease; on the contrary, that tacit relocation, notwithstanding the clause, will take place. It does not mean, that at no future period can the clause be made the ground, under the act, of removing the tenant. Mr. Erskine had no such question in view; and the Act of Sederunt expressly says, that the charge may be given "forty days preceding the Whitsunday in the year in which the tack is to determine, or forty days preceding any other term of Whitsunday thereafter:" and although the inferior Judge is empowered to eject the tenant six days after the term of removal appointed by the tack, that means a term of the same denomination with the term expressed in the tack; as, for example, if the tenant is bound to remove at Martinmas 1800, he may, under the Act of Sederunt, be warned forty days preceding Whitsunday 1800, to remove at Martinmas 1800; but should this have been neglected, he may be warned forty days before Whitsunday 1801, to remove not at the Whitsunday, but at the term expressed in his lease, that is, at the term of Martinmas, and, of course, of Martinmas 1801.

The Act of Sederunt thus furnishes a simple and easy method of ejecting the tenant; and though the obligation to remove be not enforced at the precise term of removal, the lease is preserved while the tacit relocation remains. But it may be questioned whether this act has taken away the power which, as the law formerly stood, the landlord possessed of enforcing by diligence an obligation to remove without warning. Mr. Erskine is of opinion that this power is taken away: He says, "The action of removing was competent in the opinion of Craig, 2, 9, 11, without previous warning, where the tenant became expressly obliged, by his tack, to remove and deliver the void possession to the landlord, against a precise day or term, without warning: which opinion is supported by a late decision, Dickson, January 1736, (*Supra*, p. 453.) But the dispensing with a solemnity, established on considerations of public policy, and for protecting poor tenants against the oppression or severity of their landlords, seems to elude the law, and counteract the rule, *pactis privatorum publico juri derogari nequit*. And, indeed, the late Act of Sederunt 1756, seems to have considered the matter in this light; for, though that act declares it lawful for the landlord, where the tenant has expressly bound himself to remove without warning, to charge him with horning on his obligation; yet, it is only in the precise case that he actually charges the tenant forty days before the Whitsunday, and produces the tack and horning, duly executed in Court, that the Judge

“ Ordinary is authorised to eject him in six days “ after the ish.”^a But the soundness of this opinion may be doubted. The act 1555 was not enacted for the case where the tenant became bound to remove at a precise day. We have seen that by the law, as it stood prior to the Act of Sederunt, the tenant, under such an obligation, could have been removed without the ceremony of a formal warning; and there seems to be no good reason for extending the application of the Act of Sederunt, to a case to which it was not meant to apply, and to which, perhaps, it was impossible for it to have applied.

The act holds out to the landlord advantages on his complying with certain forms; but should he decline, or rather, should he have neglected to comply with them, it may be justly doubted whether that act has deprived him of the means which the law (as it stood before the passing of the Act of Sederunt) afforded to the landlord; and, therefore, where the tenant is bound by his lease to remove at certain terms, and where by any accident the charge, forty days before the Whitsunday, has been omitted, it might be fairly argued, that a charge to remove, in terms of the obligation in the lease, followed either by personal diligence, or by an action of removing before the Judge Ordinary, should supply the omission, and effect a removal of the tenant.^b

^a Ersk. Inst. Book II. tit. vi. § 50.

^b This point seems to have been argued in the case of the Earl of Eglinton v. Fulton, 24th January 1771. Fac. Coll. Mor. p. 13886. (*Supra*, p. 455); where the opinion of the Court was ra-

The letters of horning which are raised on the lease, with a view to charge the tenant, forty days before Whitsunday, to remove, ought to proceed on the Act of Sederunt, as well as on the lease; and the bill for these letters must pray for the warrant, "in terms of the Act of Sederunt, made by their Lordships in regard to removings."^a

2. Where the Tenant is not bound by his lease to remove.

THE relief afforded by the Act of Sederunt in this case, is by an action before the Judge Ordinary,^b which being called in Court forty days before

ther in favour of a notification forty days before Whitsunday; but in this case tacit relocation, as to a portion of the lands, had taken place, and the Court pronounced a special interlocutor, which seems to recognise a principle different from that stated in the text.

^a The forms necessary under the Act of Sederunt will be found in Appendix III.

^b This action can be brought before the Judge Ordinary only, and not before the Court of Session; *Cameron v. M'Donald*, 30th June 1804. *Fac. Coll. Mor.* p. 13875. In this case the landlord applied by a bill to the Court, for authority to raise a summons of removing against several tenants, on one diet of six days, which was granted of course. The tenant objected to the competency of the action, as founded on the Act of Sederunt, which authorised, as he maintained, actions of removing before the Judge Ordinary of the bounds, and not before the Supreme Court. He argued, that the removing, founded on the Act of Sederunt 1756, is a removing brought by a landlord against a tenant previously in possession, under a lease, that although there are many other species of removings, which may be the subject of an action before the Court of Session, this removing on the Act of Sederunt must be brought agreeably to the directions of the act, one of which is, that the action shall be called before the Judge Ordinary forty days at least before the term of Whitsunday. It does not authorise this form, which might

“ Ordinary is authorised to eject a tenant to a warning “ after the warning.” But the Act of 1555, and the question may be doubted. The process proceed to be directed for the case where the tenant is removed in the same manner as if to remove at a precise time, preceded by a warning in by the law, as it stands. In this manner all the the tenant, unless he has been removed.

The landlord to argue, that he was not prevented from bringing an action before the Court of Session; but the calling of the Judge Ordinary is made the indispensable solemnities of the act 1555 are dispensed with. To this it was answered, that the practice of bringing actions of removing on the Act of Sederunt before the Court of Session has become universal. In making the Act of Sederunt, all that the Court would do, was, to delegate to the inferior Judge that jurisdiction which was previously in the Court; and as the jurisdiction previously in the Supreme Court is not expressly excluded, its jurisdiction must be cumulative with that of the Judge Ordinary. The summons on the precept of warning, under the statute 1555, might have been brought either before the Supreme Court or the Judge Ordinary; and when the Act of Sederunt introduced, in the place of these forms, a summons of removing, it followed of course, that the summons, as formerly, might have been a summons before the Supreme Court or the Judge Ordinary, in the option of the landlord. The Court considered, that as the summons of removing was founded on the Act of Sederunt, the direction given therein must be followed out; and as it does not authorise this process to be brought in the Supreme Court, nor upon one diet of six days, there were sufficient reasons of expediency for limiting it to the jurisdiction of the Judge Ordinary.

* When the tenant's farm is in one county, and his dwelling-house in another, the process must be raised in the county where the lands lie, because the action is a *real* one, to be followed by ejection, which the Sheriff of the county alone can execute. Besides, although the tenant does not reside in the county personally, he does so in law by means of his servants. This point is understood to have been decided in the case of *Shaw Stewart v. Kerr*, 7th March 1806; *Not reported*. It has been thought by some high authorities in our law, that in the case also, where the tenant is out of Scotland, the Sheriff-court is the proper one, the defender be-

ties and peculiarities of the old form of warning got over, and the business reduced to a single action, which requires only to be executed in Court forty days before the term of the next order to authorise the Judge Ordinary to decide in the removing.^a And although this privilege was intended for those cases where there is no obligation to remove without warning; yet, so simple and efficacious has it been found, that even where there is an express obligation on the tenant to remove without warning, this form of bringing the action before the Judge Ordinary has been resorted to, and is now the most ordinary form of accomplishing the removing.

In the usual form of the summons,^b the Act of Sederunt is founded on; but it has been questioned, whether an action of removing, executed against the tenant, and called in Court forty days before

ing cited by letters of supplement from the Court of Session. This point, however, has not been decided.

^a The summons ought to call forty days before Whitsunday, according to the ordinary rules of calling actions in the Inferior Court. The strict rule, however, was departed from in a late case, in which the Court held, that a summary application to the Sheriff, served upon the tenant, forty-five days before Whitsunday, with an order to answer in two days, was equivalent to a regular citation, in terms of the Act of Sederunt. The tenant pleaded, that an action with certain *induciae* was requisite, but that a summary application might have any *induciae*, and did not require to be called. This, however, the Court thought not to be inconsistent with the provisions of the Act of Sederunt, or disconform to the practice in the particular county, and accordingly they refused a petition for the tenant without answers. Hoy, petitioner, 2d June 1810. Fac. Coll. But it is proper to mention, that doubts have been expressed of the soundness of this decision, by an authority entitled to great respect.

^b See Appendix III.

Whitsunday, would not be effectual, although the Act of Sederunt was not libelled on.—This is a question which may occur in the case of an accidental omission, but no man of business will intentionally omit founding upon the act. It would rather seem that the Court would not sustain the action, unless the act were libelled on, or a minute lodged in the process more than forty days before Whitsunday, claiming the benefit of the Act of Sederunt.*

* *Carruthers v. the Viscount of Stormont and his Commissioner*, 4th July 1764. *Fac. Coll. Mor.* p. 13868. In this case, a process of removing was called before the Sheriff, on the 29th March 1763, on a warning under the act 1555, charging the tenant to remove from the arable lands at Candlemas 1763, and from the houses and grass at Whitsunday 1763. On the 14th April, the landlord restricted the conclusion to the terms of Candlemas and Whitsunday 1764, and craved that decree might take effect at these terms, in respect of the Act of Sederunt, which renders a libelled summons called in Court forty days before Whitsunday equal to a warning in terms of the Act of Parliament. This action had been brought originally on a warning to remove at Candlemas and Whitsunday 1763, and that not having been departed from, it would have been necessary, in order to have given the same effect to the action, as if the Act of Sederunt had been originally libelled on, to have intimated to the tenant the proposed change by a minute put into process forty days before Whitsunday 1763, Candlemas and Whitsunday 1764 being the terms of removal: But this not having been done, to have sustained a removing in this process, would have been not only to have admitted of a party's changing his action from a removing under the statute, to a removing under the Act of Sederunt, but it would have been also to have dispensed with the requisites of the action under the Act of Sederunt. The Court accordingly "remitted to the Lord Ordinary, to remit the cause to the Sheriff, with this instruction, That he assolvie the defenders, in respect there was no proper action brought upon the Act of Sederunt forty days preceding Whitsunday 1763, for removing them at Candlemas and Whitsunday 1764."

In order, therefore, to obtain the benefit of the Act of Sederunt, it must be libelled on ; or where it has not, it would seem that the pursuer will be allowed, during the dependence, to intimate to the defender, that he is to take the benefit of the Act of Sederant, and crave decree of removing in terms of it, provided such intimation be regularly made forty days before the Whitsunday preceding the term of removal.

These observations, with the assistance of the forms in the Appendix, will have sufficiently explained the manner in which a removing is carried through; and I shall now proceed to consider the nature of the defences competent to the defender against this action.

DEFENCES AGAINST THE ACTION OF REMOVING.

BEFORE the tenant is allowed to state his defences against this action of removing, he must find caution for the violent profits.* The act 1555 provides, that if the tenant appears in the action of removing, and instantly shows sufficient title to possess the lands, the Judge shall proceed and do justice, as accords of law: But should the defender appear and produce nothing, " But " makes allegiance, and offers him to improve the " indorsation, in that case, he shall not be heard " in judgment, but gif he find sufficient caution

* See Appendix, III.

“ to the warner, then instantly that gif his alle-
 “ geance being funden relevant, be not sufficient-
 “ ly verified and proved be him, that the profits,
 “ damage, and interest, quilk the said warner, or
 “ any others, havand interest, has sustained, or
 “ sall happen to sustain, be the delay of the fore-
 “ said allegiance, be refundit to him.” The Act
 of Sederunt also, after having prescribed the man-
 ner of bringing the action into Court, declares,
 that “ the Judge shall thereupon proceed to de-
 “ termine in the removing in the terms of that
 “ act, and in the same manner as if a warning
 “ had been executed in terms of the foresaid Act
 “ of Parliament.” So that, whether the one form
 of the action or the other is adopted, the proce-
 dure in both, after they are brought into Court,
 is precisely similar; and, of course, the finding cau-
 tion for the violent profits, as they are called, is
 requisite in either case.

The terms of this cautionary obligation are,
 that the cautioners shall pay the landlord “ what-
 “ ever sums of money shall be decerned to be
 “ paid by the tenant in name of violent profits;”
 an obligation which has been held to include not
 only the highest profits which could arise out of
 the subjects of the lease, but even to infer an ob-
 ligation on the cautioners to repair damage done
 to the subjects.*

* Morton & Co. v. Colquhoun, 21st November 1783. Fac. Coll.
 Mor. p. 13893.—“ Colquhoun and M'Farlane having been caution-
 “ ers to Martin & Co. for the violent profits for which a tacksman
 “ might be found liable in consequence of his refusal to remove,

*Defences arising from the state of the
Pursuer.*

1. WHAT has been said in regard to the title to give a precept of warning,^a under the act 1555, is also applicable to an action of removing before the Sheriff, on the Act of Sederunt. But there are two exceptions which it may be proper to consider: These are, the cases of a purchaser with a disposition, and of a tenant with a lease for 19 or any lesser number of years.

It is obvious, that as matters formerly stood, when a precept of warning was necessary, the pursuer of a removing, upon either of these titles, would have been exposed to objections which, under the Act of Sederunt, do not seem to apply. Mr. Erskine says, "The common opinion that sasine is a necessary title in all removings, where the tacks have not flowed from the pursuer, is not clear of difficulties. It is doubtless true, that those who have barely personal rights to land, cannot, by the genius of the Scottish law, hold courts, not even for the payment of rents; because the holding

" were sued for the reparation of the damage done to certain subjects of the tack. In opposition to which claim, they contended, that though, by the above-mentioned terms of their obligation, they were indeed bound to the extent of the highest profits which could arise out of the subjects set, yet their obligation did not include the repairing of such damage."—This defence was repelled.

^a *Supra*, p. 444.

“ of courts is an act of jurisdiction, which, being
“ incident to a feudal tenure, cannot be exercised
“ without sasine. But though, for that reason, a
“ proprietor not infeft cannot insist in a removing
“ before his own court, he seems entitled by com-
“ mon law, in consequence of his property, to
“ bring a removing against tenants before the
“ Sheriff, whether their leases have flowed from
“ himself, or from others, in every case where
“ they cannot show a better right than his ; for as
“ a disposition to lands carries an express right
“ to mails and duties, or to the rents, the right
“ of removing tenants appears to be a necessary
“ consequence resulting from thence.” This ob-
servation seems well deserving of attention ; a
purchaser, with his disposition, has a right to the
lands, to the rents, and to the leases. They are
expressly assigned to him ; they are mere person-
al rights ; the tenant depending on the lease as
his sole title of possession, can, on its expiration,
found on no right in his person which can stand
in competition with the conveyance in favour of
the purchaser ; and it is not easy to explain why
the Judge Ordinary should not be authorised, in
these circumstances, to declare that preference,
and to give effect to the purchaser’s title by put-
ting him into possession. The title even of a new
tenant, in competition with an old one, whose
lease is expired, is in the same situation ; and the
question of preference might certainly, without

* Ersk. Inst. B. II. tit. vi. § 52.

any bad consequences, be judged of by the Judge Ordinary.

It is no doubt true, that but a short time before the date of the Act of Sederunt, the Court refused to sustain a removing at the instance of a purchaser holding a minute of sale, even although the seller appeared and concurred with him.^a But this decision, pronounced at a time when the removing depended on the validity of the precept of warning, is not an authority which can affect the opinion delivered by Mr. Erskine; and it may be doubted, whether the right of a purchaser, with his naked disposition, or even that of a new tenant with his lease, be not a sufficient title for founding an action of removing under the Act of Sederunt against the tenant, whose lease is expired.^b

^a Paxton v. Hunter. Kilk. p. 581. Mor. p. 18121. *Supra*, p. 445. "The pursuer was found to have no title in his person to pursue such a process, nor was his authors compearing and concurring, found sufficient to support the action, in respect there was no summons in his name."

^b The more recent decisions of the Court seem to support the opinion of Mr. Erskine here referred to; and, in general, it would rather appear that the strictness of the older law, with regard to the pursuer's title, in an action of removing, has been considerably modified.

In *Ferguson v. Morrison*, 24th June 1802; Fac. Coll.; Mor. p. 13806, it was found, that a disponee not infeft, may pursue such an action in his own name, and that of his author, although the one was denuded, and the other not infeft.

In *Milne v. Young*, 23d November 1807, *Not reported*, but noted in the report of *Campbell v. M'Kellar, &c.*, 2d March 1808; Fac. Coll.; and Mor. Appendix, *voce Removing*, No. 5, a tack was granted by a purchaser uninfeft, who afterwards sold the property without completing his own titles. His disponee also, without

These, however, are questions which are not likely to occur; since in the case of a purchaser

taking infestment, pursued an action of removing against the tenant who had derived right from the pursuer's author; and the Court held, that the disponent's title was sufficient without infestment, on the ground that the granter of the tack could certainly have removed this tenant without taking infestment; and as all the right he had was vested in his disponent, the title of the one was as good as that of the other.

In a case where the disponent was not infest at the date of executing the summons of removing, but where the infestment was taken before the calling of the cause, which was regularly called forty days before Whitsunday, a great majority of the Judges were of opinion, that the title of the pursuer was sufficient. The following is reported as the opinion of the Court:—"While the removal of tenants was accomplished by a precept of warning, executed by the bailie or officer of the proprietor of the land, and while the landlord was exercising an act of jurisdiction, infestment previous to the date of the precept might be necessary: But the law has relaxed gradually from the rigour of this ancient rule; and, without injuring the security of the tenantry, a more simple process of removal has been introduced. In terms of the Act of Sederunt, the calling of the summons forty days before Whitsunday is equivalent to an execution of warning. If infest, therefore, as in this case, *at the time of calling the summons*, the pursuer is to be held and considered as having warned: such was the opinion of the Court in the case of *Stewart v. Spalding*, (21st January 1791; *Not reported*); and the security of the tenant is not affected, because, before decree, the title of the pursuer must be completed." *Campbell v. M'Kellar, &c.* 2d March 1808. *Fac. Coll. Mor. Appendix, voce Removing, No. 5.* See this case, which is very fully reported.

In the case of *Stuart v. Spalding*, 21st January 1791, *Not reported*, but above referred to, it seems to have been held that a decree of sale was a sufficient title to pursue a removing.

In another unreported case, an apparent heir, before investing himself with any title, had raised a summons of removing on the Act of Sederunt, concluding that the tenant should be removed at Whitsunday 1800. The summons was called more than forty days before Whitsunday, and taken out and returned in the month of June thereafter, with a defence that the pursuer had produced

with a disposition containing an assignation to the leases, he will either obtain the express authority of the former proprietor to prosecute the removing in his name, or the assignation to the lease in the disposition will be founded on, as a sufficient title for raising the action in that form. And in the case of a tenant with a lease, the landlord will not fail, for his own sake, to remove the former tenant in due time, as the new tenant will otherwise seek redress in an action against the landlord.

Where the pursuer dies during the dependence of the action of removing, his heir, on completing

no title. Nothing farther was done until April 1801, when the pursuer executed a summons of waking, and in the month of July following he was infest: So that the process had been commenced, and the term at which removing was concluded for in the summons had been allowed to elapse, before the titles of the pursuer were completed. On this ground, the Lord Ordinary had sustained the tenant's defence; but the Court altered that interlocutor, and decreed in the removing with expenses. *Brown v. Lang*, 10th February 1802, *Not reported*, but noted in *Campbell v. M'Kellar*, *ut Supra*.

In *Johnston v. Martin*, 3d March 1810; Fac. Coll.; it was held that an heir had a sufficient title to pursue an action of removing, provided he was infest before the calling of the cause, although he had not been infest before the execution of the summons. It was observed from the Bench, that by the Act of Sederunt 1756, the calling in Court, not the execution of the summons, was declared to come in place of the statutory warning.

As to the nature of the title to be produced, it would seem that an infestment *ex facie* regular is sufficient; and that where such a colourable title is produced, the tenant is not entitled to plead that the pursuer's right is inferior to that of a third party; (see Lord Kaims Essay 3.) The landlord need not produce his title at all in the action, unless it is called for by the tenant; and the nonproduction of the title where the production is not called for, will not invalidate the removing. So it is understood to have been decided in *Robertson v. M'Donald*, 16th May 1807, *Not reported*.

his title, may follow out the action commenced by his predecessor. There are several old decisions, in which it has been found, that an heir, retoured and infeft, may pursue a removing on a warning given by his predecessor, even when the predecessor survived the term of removal specified in the precept.* A warning against a tenant, who died before the summons was raised, has also been held as a sufficient warrant for proceeding against the tenant's heir, without the necessity of a new warning.†

*Defences arising from the situation of the
Defender.*

1. WHERE the defender is a sub-tenant, or an assignee, whose assignation has not been intimated, it is not necessary that proceedings should be instituted against him. It is sufficient to institute them against the principal tenant. This point is regulated by the 3d article of the Act

* Earl of Haddington v. his Tenants, 28th July 1637. *Durie*, Mor. p. 3173. In this case, the landlord died a few days after the Whitsunday at which he had regularly warned the tenant to remove. The objections stated to the heir's proceeding on this warning were, 1. That the precept of warning became extinct by his predecessor's death. 2. That the heir's service and infeftment were both subsequent to the term of removal specified in the warning. But the Court found, that the heir might competently follow out the action, "as well where the defunct dies before the term, to which the warning was made, as where he dies after the term." See also Ramsay v. Home, 27th November 1629. *Durie*. Mor. p. 3173.

† Home v. Kennedy, 25th February 1566. *Maitland*. Mor. p. 3172; Where it is reported under the names, Cranston v. Brown; Home v. Home, 27th January 1630. *Durie*. Mor. p. 3173.

of Sederunt 1756, which enacts, that, "Where
 " a tack is assigned, and the assignation not
 " intimated by an instrument, or where lands are
 " subset in whole or in part to sub-tenants, and
 " such horning executed as aforesaid, or where
 " process of removing and decree is obtained, or
 " where warning in terms of the act 1555 is used
 " against the principal original tacksman, the
 " same shall be effectual against the assignees or
 " sub-tenants as aforesaid, and shall be sufficient
 " ground of ejecting them, any thing in the for-
 " mer practice of the country notwithstanding."
 So that the want of proceedings against a sub-tenant, or against an assignee whose right has not been intimated, affords no defence to such assignee or sub-tenant, in whatever shape the removing may be brought, whether in the form of an action under the act 1555—a charge of horning on an obligation to remove—or an action under the Act of Sederunt.

But where an assignee has intimated his right to the landlord, it will afford him a defence against an action of removing, that the landlord has called only the principal tenant.*

2. It is a relevant defence to a sub-tenant, against an action of removing, that the principal

* Where an assignee has been in possession, or where he has been acknowledged by the landlord, but where the assignation has not been regularly intimated, it has been doubted by some lawyers, whether it would not be necessary to make such an assignee a party to the action of removing, in the same manner as if the assignation had been intimated to the landlord. Where an assignee is in such circumstances, therefore, it will be proper to call him in the action.

tenant has not been called;^a although it would rather appear, that where tacit relocation has taken place, and the sub-tenant has been in the practice of paying the rent directly to the landlord, there is no occasion to call the principal tenant.^b

^a Lockhart v. Ogston, 18th January 1745. Falconer. Mor. p. 13814.

^b The decisions upon this point are scarcely consistent with each other. In Laing v. N——, 1565; Spottiswood *voce* Removing; Mor. p. 13807, the warning was found not to be lawful, because the principal tenant was not warned; and in this case the original tack had expired, and the principal tenant was not in possession. In Whiteford v. L. Johnston, 2d December 1628; Durie; Mor. p. 13809, it was found, that a compriser must warn the authors of the sub-tenants as well as themselves, and this even although the tacks were expired, and the principal tacksman was not in the natural possession. In Lady Lawriston v. her Tenants, 6th March 1632; Durie; Mor. p. 13810, it was found to be unnecessary to warn the principal tenant, whose right had expired before the warning, "seeing *tacita relocatio* could avail to none but "to the actual possessor," who was the sub-tenant. The sub-tenant in this case, it appears, had paid the rent directly to the landlord. In Richard v. Kirkland, 30th January 1663; Stair, and Gilmour; Mor. p. 13812, it was also found, that if the tack is expired, it is sufficient to warn the person in the natural possession, and not the original tenant. In a very late case, this question was fully argued. See the case of the Duke of Queensberry v. Barker, 7th July 1810; Fac. Coll.; in which the Court held, that a sub-tenant, who was accustomed to pay his rent directly to the landlord, might be removed at the stipulated expiration of the lease without calling the principal tenant. The Court, however, was considerably divided in opinion, and the late Lord Meadowbank and Lord Robertson were in the minority. These Judges considered removings to be cases of law more than of equity; and that it was possible to suppose, that the principal tenant might have had a defence of which the sub-tenant might be ignorant, or, at any rate, which he might not be entitled to plead. They also held, that the principal tenant was in the civil possession, by means of his sub-tenant, and ought not to be removed without having an opportunity of defending himself. But Lord Justice Clerk, Hope, and Lords

Defences founded on the period and nature of the Tenant's possession.

IT may not appear altogether out of place here to consider the view which has been taken of questions between landlord and tenant, as to what are termed *away-going crops*. These questions arise in cases where the entry to the farm is at the term of Whitsunday, and, of course, as in all other questions of this kind, the rule of law may be affected by the express agreement of the parties.

The general rule seems to be, that the tenant is entitled to an away-going crop, that is, to the crop sown before the term of removal but reaped after it. The Court of Session has more than

Glenlee and Newton, were of a different opinion. They thought that the principal tenant could not be said to have a lease *for terms to run*, when it was to expire at the very next term after citation: that, confessedly, tacit relocation could not take place in favour of the principal tenant, who was not in the natural possession, and not even acting as the medium for conveying the rent to the landlord, and whose right consequently expired at the term libelled: that if warning had been given, the sub-tenant alone could have been benefited, or could have claimed possession, and, consequently, it was necessary to call him alone. Lord Glenlee also attached importance to the circumstance of the surplus rent being merely elusory, and the defender being more in the nature of an assignee than a sub-tenant.

All these cases apply to sub-tenants admitted with the landlord's consent, or by the terms of the lease. With regard to sub-tenants in a different situation, and who have never been acknowledged by the landlord, they, and other unwarrantable possessors, may be removed at any time during the currency of the lease, on a summary application, without any regular process, or intimation to the principal tenant. *Earl of Marchmont v. Fleming*, 22d February 1743. Clerk Hume. Mor. p. 13839.

once shown an inclination to favour the tenant, even when he had expressly bound himself to remove at the term of Whitsunday, on receiving indemnification from the landlord for the damage. The principle on which this general rule is understood to be founded, is, that a tenant, who is entitled to hold his possession during seed-time, is also entitled to prepare the ground and to sow it, and, consequently, to reap the crop which he has sown. This rule, it would appear, is very generally received in practice; for although, in arable farms, the term of entry is said to be Whitsunday, yet the almost invariable custom of the country is, that the new tenant gets possession at that term of the houses and pasture lands only, and the outgoing tenant retains possession of the arable land until he has reaped the crop sown by him. Indeed, it is obvious, that any other rule might be seriously hurtful both to landlord and tenant; for as the tenant is entitled to exclude every one from the farm until the term of his removal, it might happen, where that term is Whitsunday, that the tenant, by holding the exclusive possession until the term-day, might lay the whole arable part of the farm waste during a year, for he is not bound to sow the ground for the incoming tenant, and, after the term of Whitsunday, the incoming tenant is too late to sow a crop for himself; and as to the landlord, it is quite clear that, in such circumstances, he cannot insist for the rent against either tenant.

But although this is understood to be the general rule on which the Court of Session is dis-

posed to proceed, yet it has happened that upon two occasions the House of Lords have viewed the matter differently. In one of these cases, however, it seems to be admitted, that some error has crept into the proceedings in the House of Lords, and in the other, the special agreement of parties was so expressed, as to render the case hardly a decision upon the general question.*

* The first of the cases above referred to, is *Scott v. Brodie*, 2d March 1803. *Fac. Coll. Mor. Appendix, voce Tack*, No. 8. Here the term of entry was declared to be Whitsunday, and the tenant bound himself to remove at the expiration of the tack, "*which will be at the term of Whitsunday 1802*," without warning or process of removing. When this lease had expired, the tenant maintained that he was entitled to reap the crop 1802; and the landlord presented a bill of suspension and interdict, for the purpose of preventing him from ploughing any part of the farm after the separation of crop 1801 from the ground. This bill was passed "in respect of no answer," and the question came before the Court of Session by a petition and answers for the tenant and landlord, when the Court ordered the interdict to be removed, thus fixing that the tenant was entitled to an away-going crop. But on appeal, the House of Lords declared, that "*in this case the tenant will not be entitled to an away-going crop*," and remitted to the Court to review their interlocutors. The Court, in order to apply this judgment of the House of Lords, remitted to the Lord Ordinary to pass the bill of suspension and interdict; and on discussing the merits, the Lord Ordinary (the late Lord Meadowbank), was clearly of opinion, that if the tenant had paid *nineteen rents* and had reapt only *eighteen crops*, he was entitled to an away-going crop. But although the principle of the Lord Ordinary's judgment was allowed to be correct, the Court held, that the declaration of the House of Lords, that "the tenant in this case was not entitled to an away-going crop," superseded all discussion on the merits, but "they were unanimous, that an error had crept into the proceedings which could not now be remedied in this Court."

The other case is that of *M'Michan v. Hutcheson*, 5th February 1801, *Not reported*. This also was a case of a Whitsunday entry to a corn farm. But the lease contained the following clause,

But even where a tenant is entitled to an away-going crop by the terms of the lease, he is not en-

"Providing and declaring, that in case the landlord shall sell his estate, and that the purchaser shall incline to assume the possession of the lands and others hereby let, it shall be in his power so to do at the period of seven years, from the commencement of this lease, or at any term of Whitsunday thereafter, during the currency hereof, upon making due and lawful intimation of such his intention to the tenant by a Notary Public, at least one year previous thereto, and allowing to the tenant one full year's rent for defraying the expense of sowing out the lands that year in tillage with grass seeds and clover, and in consideration of leaving the whole lands in grass, and removing from the same at a term of Whitsunday." The landlord sold the estate; and the purchaser being desirous to take the benefit of this condition, and to assume possession of the farm at Whitsunday 1801, made regular intimation to the tenant to that effect on the 1st April 1800, more than a twelvemonth before his intended entry, at the same time expressing his willingness to implement his part of the bargain, by allowing the tenant a full year's rent for defraying the expense of sowing the lands with grass-seeds, and in consideration of his removing at Whitsunday, declaring, if he failed, that he should be liable in damages. A process of removing was then brought before the Judge Ordinary, and decree given, decerning the tenant to remove at Whitsunday 1801. But as the tenant was proceeding to plough the lands for crop 1801, which must have put it out of his power to leave the lands in grass, in terms of his agreement, the landlord applied to the Court of Session for an interdict. This was refused, with a reservation to the landlord to apply to the Judge Ordinary. Application was accordingly made to the Stewart of Kirkcudbright, who granted the interdict, but found no damage due for what had been ploughed. Both parties complained by advocacy to the Court of Session; and the Lord Ordinary conjoined the advocations and continued the interdict, superseding consideration of the questions as to damages and expenses. But the Court altered this interlocutor, and removed the interdict, thus holding, that even under such a clause in the lease, the tenant was entitled to an away-going crop. This judgment, however, was reversed on an appeal; and on the return of the case to the Court of Session, they adhered to the Lord Ordinary's interlocutor, and found that the tenant had no right to an away-going crop.

But the general doctrine stated in the text, and in Lord Mea-

titled to retain possession of the barns for the purpose of threshing out the crop.*

Defences in the case of a Liferent Lease.

THE situation of the heirs and tenants of a liferent tacksman is analogous to that of the heirs and tenants of a liferenter; and the rule in both cases is the same.^b Where the liferenter or liferent tacksman has been in the natural possession of the farm, his heirs on his death are not entitled

dowbank's interlocutor, in *Scott v. Brodie*, (*Supra*, p. 475,) has been fully confirmed by the decision in *Fullarton v. Crawford, &c.* 4th March 1814; Fac. Coll; where the Court found unanimously, that at the expiration of a lease with a Whitsunday entry, the tenant is entitled to an away-going crop.

* *M'Ewen v. Paterson*, 19th November 1803. Fac. Coll. Mor. p. 13891. There seems to be an error in the rubrick of this decision, as stated in the Faculty Report. It is said, that "*an out-going tenant must remove from the barns at Martinmas.*" The result of the decision, however, rather seems to be, that he must remove at *Whitsunday*. This error, if it be one, has been followed in *Mr. Morrison's Synopsais*, and also in a compilation of the Indexes, &c. of the Faculty Collection, which has been recently published.

^b The right of the liferenter is thus explained by Craig, Lib. ii. Deig. 9, § 13. De usufructuario quæstio occurrere solet, An ejus morte proprietarius sive dominus denunciationem facere debeat? An vero (ut vulgo dici solet) mors terminum faciat? In qua questione hæc distinctio est observanda, ut si usufructuarius per se possideat *i. e.* suis operis et instrumentis prædium colat, aret, et serat, diem mortis ejus terminum facere receptum est; poteritque dominus sua auctoritate prædium ingredi, et colere, si quid ex cultura sit residuum; ita tamen ut sementem jam factam executoribus defuncti colligere et distrahere pro arbitrio permittat: ulterius se-rere, licet arata sit terra, poterit impune prohibere.—Quod si usufructuarius, aut quicunque alter ille sit, qui jus vitale possessionis in prædio habuerit, aliis id utendum et fruendum permiserit, fructuum quadam pensione aut mercede annua contentus, isque moriatur, coloni in sequentis Pentecostes ferias intacti remanebunt: quod ad utilitatem colonorum introductum est, ne novas sedes ante tempus solitum querere cogantur.

to take possession, and the fiar or the landlord may assume possession summarily. But where the liferenter or liferent tacksman has possessed by means of sub-tenants, in order that these sub-tenants may not be exposed to the hardship of being ejected between terms, the landlord is not entitled to remove them until the next term of Whitsunday.^a

The analogy between the cases of the heirs of a liferenter and that of the heirs of a liferent tacksman, has not at all times been recognised by the Court. On the contrary, it was formerly held that the heir of a liferent tenant was entitled to continue the possession until regularly removed by a warning.^b And although, by a more recent decision, it had been found that the heirs of a liferent tenant might be summarily removed without

^a Ersk. Inst. B. II. tit. vi. § 49. This privilege is secured to the tenants of liferenters by the act 1491, c. 26. "Item, it is statute and ordained, that when onie lands fallis in waird, or when onie ladie havand terce or conjunct-fefment, happenis to decies; or quhat land be redeemed or lowsed be reversion, gift, selling, or wedsetting, or ony utherwaies lands happenis to be altered, The tennentes, labourers, and inhabitantes, onie of the said lands, sall remain unput fforth or removed quhill the next term of Whitsunday followand, payand to the lord that sall enter to the said landes, the mails and dewties aucht and wont of the said landes, quilk bruiking, sall induce na possession langer than the said Whitsunday."

^b *Laird Rowallan v. the Relict of Boyd*, 19th February 1630. *Durie and Auchinleck*. Mor. p. 13825. This was a liferent tack, and on the death of the liferent tenant, his relict and children maintained that the landlord was not entitled to remove them without a warning. The landlord replied, that as the heirs of liferenters by infeftment might be removed summarily on the liferenter's death, *a fortiori*, might a mere tacksman. But the Court found, that summary removing in this case was incompetent, and that the relict must be regularly warned before Whitsunday.

a warning; yet, in that case, the liferent lease had been let for an elusory rent, and there was room to argue that it was substantially a liferent right.^a

But the question may now be considered as entirely set at rest by two recent decisions, by which the following points have been fixed:—1. That on the death of a liferent tenant, his representatives may be removed summarily between terms. 2. That where they are so removed, they are entitled to reap such part of the crop as may have been sown by their predecessor, on payment of a proportional part of the rent. 3. That they are not entitled to any part of the grass crop, or to any other of the farm produce. And, 4. With regard to the labour bestowed by the liferent tenant in preparing the ground to receive a crop, that it must be paid for by the landlord.^b

^a *Tenant v. Tenant*, 22d February 1760. Sel. Dec. p. 221. Fac. Coll. and Mor. p. 13845. The liferent lease in this case was granted to a relation of the proprietor at the rent of one merk. On the death of the liferent tenant in the month of December, the landlord took possession *de plano*, without warning or any process at law, and proceeded to plough and sow the lands. In an action at the instance of the liferent tenant's heir for the value of the crop, and for damages, the argument for the heir was founded on the act 1555, and on the necessity of warning every tenant before he can be removed. It was answered, that the object of warning is to prevent tacit relocation; but in a liferent lease there are no *termini habiles* for tacit relocation in the person of the heir of the liferent tenant. The elusory nature of the rent was also founded upon by the landlord; and the Court "found that there was no necessity for "a warning in this case."

^b *Baron Gordon v. The Representatives of Michie*, 13th Dec. 1794. Fac. Coll. Mor. p. 13851. In this case the liferent tenant died in the month of June. The landlord allowed the heirs to reap the crop on the ground; but as they also claimed a right to

Where the liferent tenant has possessed by sub-tenants, it remains to be considered, whether these

possess, until regularly removed by an action of removing, he applied to the Sheriff by summary petition, praying that they might be forthwith removed. The Sheriff, on the 15th of October, ordained them to remove within fourteen days. The case came to the Court of Session by an advocacy against the judgment of the Sheriff, and was very fully argued. For the heirs it was pleaded, That a tenant is entitled to continue in possession after the term of removal stipulated in the lease, until he be regularly removed; and it makes no difference whether possession be claimed by the tenant or by his heir: that this is the case with an ordinary tenant, but a tenant for life has higher powers, and his heir is better entitled to favour where the lease expires between terms, when he may have no place to which he can remove, and when the effects of the deceased, if they must be disposed of, may be disposed of to great disadvantage. It was admitted, that the heir of a liferenter might be removed; but it was argued, that there is this difference between him and the liferent tenant, that the former possesses gratuitously, and therefore a renewal of the right will not be presumed, whereas the latter pays an adequate rent for the subject. The tenants, even of a liferenter, cannot be removed at his death without warning, as little could the assignees or sub-tenants of a liferent tenant, and there seems to be the same reason why his heir should be protected in the possession. Besides, the heir is liable for the current year's rent, and, consequently, is entitled to the year's possession; were it otherwise, it would be impossible to ascertain the proportion of rent.—The landlord answered, That when a lease is descendible to heirs, the representative of the tenants are entitled to possess till they are regularly warned to remove; the heir has then a lawful title of possession on which tacit relocation can take place: but in a liferent right, the heir, from the nature of the right, is excluded. It never was supposed, that the heir of a liferenter could make up feudal titles to the subject liferented by his predecessors; and although service is not necessary to give right to a lease, the heir of a liferent tenant is, for the same reason that would exclude him from completing a title to it, were that necessary, excluded from entering into possession. The liferent-infestment or liferent lease was the only circumstance which excluded the right of the proprietor, and that being removed, he alone is entitled to take up the possession. Farther, it was argued, that as warning cannot be

sub-tenants may be removed in the same summary manner with the heir when the tenant has been

made before the death of the tenant, if the warning were required, it would, where the lease was beneficial, enable the heir to exclude the landlord for a year after the death of the tenant. Whereas, in the case of a disadvantageous lease, the heir might remove at once, and the landlord could not compel him to continue in possession. In this case, there was no dispute as to rent; and where that occurs, it was said it might be easily adjusted. The Court, on the general ground, found unanimously, That the heir of the liferent tacksman could be removed summarily.

The decision in Baron Gordon's case is held to have settled this point. *Stewart v. The Representatives of Grimmond*, 24th June 1796. Fac. Coll. Mor. p. 13853. In this case, the liferent tenant died on the 19th of April; and on the 25th of that month the landlord presented a petition to the Sheriff, praying that the representatives might be summarily removed. The Sheriff ordained them to remove accordingly; and the case came to the Court of Session by advocacy, in which the same line of argument as that used in Gordon's case was adopted. But the Court, "considering it as fixed by that decision, that the representatives of a liferent lessee may be removed summarily, unanimously refused the petition without answers." By the Sheriff's interlocutor in this case, a rule, of which the Court of Session approved, is established for settling the claims of the parties on each other in such circumstances. The Sheriff "finds it alleged by the pursuers, and not denied by the defenders, that Patrick Grimmond, the liferent tacksman of the farm in question, died upon Tuesday the 19th April last: finds, That, in so far as the grounds were sown at the death of the liferenter, the defenders will be entitled to reap the crop thereof, on paying a proportion of the whole rents effeiring thereto: but finds, That they have no right or title to sow or reap any other part of the farm, nor to use the grass thereon, whether sown or natural; and decerns summary removing against them, with the explanation foresaid; and, with this farther explanation, that, in so far as the defunct has laboured ground not sown at the time of his death, or the defenders, since that period, have laboured such ground, the pursuers must pay a *bona fide* price for such labour; and farther decerns the defender to pay the pursuers £20 Scots of damages and expenses, in case they fail to remove."

in the natural possession of the farm. It is certain, that a person, possessed of a right depending on his own life for its existence, cannot grant a sub-right which can have any longer endurance; and, therefore, upon principle, the tenants of a liferenter have no more title to remain than the heir of the liferenter has. But the statute above quoted^a has given to the tenant of the liferenter a right to remain *unput forth*, as the act expresses it, until the term of Whitsunday following the death of the liferenter. It does not follow from this, however, that the tenant is to be warned forty days before Whitsunday of the year in which he is to remove, as directed by the act 1555, which was not in existence when the act, conferring the privilege on the sub-tenants of liferenters, was passed; and the obvious intention of the Legislature was to give the tenant of the liferenter the privilege of remaining till the next Whitsunday, which, without that enactment, he would not have possessed. If the tenant of a liferenter, therefore, enters at Martinmas, and the liferenter die in the summer following, the tenant will not be entitled to plead that he must be warned forty days before the Whitsunday following the death of the liferenter to remove at the subsequent Martinmas: such a plea, were it sustained, in place of securing him in his possession, and saving him from the damage and loss that might attend his instant removal, would give him possession for a

^a Act 1491, c. 26. *Supra*, p. 476.

year more, which would be an act of injustice to the proprietor.^a

The sub-tenant of a liferent tacksman, and the tenant of a liferenter, appear to be very much in the same situation; they both hold possession under a lease terminating with the life of their author; and the damage and inconvenience arising from a summary removal will be fully as great in the one case as in the other. Upon this principle, therefore, the privilege which the one enjoys ought also to be extended to the other.

The conclusion seems to be, that, as our practice would not, on the one hand, expose the sub-tenant, possessing under a liferent tenant, to the hardship of removing on the day of the liferent-tenant's death; so, on the other, when it gives to such sub-tenant the same indulgence which has been provided for the tenant of the liferenter, it will have done all that justice requires.^b

^a This is a point which has not been considered as altogether free from doubt. Some eminent living authorities hold, that, although the act 1491 is prior in date to the act 1555, yet as both acts were intended for the benefit of tenants, so the usual warning of forty days before Whitsunday ought to be given in the circumstances stated in the text. Besides, the act 1555 applies to "*all tennentes*" of lands, &c., and may therefore be said to include the tenant of a liferenter.

^b It is proper to observe here, that leases granted for the lifetime of the granter are not in the same situation with liferent leases. A lease had been granted to endure all the days of the lessor's life. The lessor died on the 30th March; and on the 4th April following his trustees brought an action of removing against the tenant; but they were not infeft as trustees till the 5th. The tenant's defence was founded on the want of title in the trustees; and the Sheriff having sustained the defence, the action was brought in the form of advocacy before the Court of Session. The Court did not

in the natural possession of the farm-
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 on the tenant whose right is declared to terminate
 and they may therefore be summarily ejected as un-
 possessors. It was observed, that even where a life-
 has sublet his farm, the sub-tenant, having a title of
 must be regularly warned. Johnston's Trustees, peti-
 2d July 1803. Fac. Coll. Mor. p. 15207. A similar de-
 had been pronounced, Udny v. Brown, 1st December 1802,
 not reported, but referred to in the report of the case of Johnston's
 trustees.

A tack granted by an heir of entail, in violation of the prohi-
 tions of the entail, does not expire by the death of the granter,
 but must be reduced before the tenant can be removed. Vans.
 Agnew v. Gillespie, 23d June 1813. Fac. Coll. In this case,
 it was argued, that, as a liferent lease expired *ipso facto* by the
 death of the tenant, so a tack, by a person who was only en-
 titled to grant it during his own life, must be held to expire
 in the same manner by the death of the granter; and the suc-
 ceeding heir may enter *de plano*. But the Court held, that a
 lease granted by an heir of entail in possession does not expire *ipso*
facto on his death, but must be reduced. The late Lord Meadow-
 bank, who was Lord Ordinary in the case, issued the following note:
 "An heir of entail in possession is an unlimited fiar in every re-
 spect, unless the *jus crediti*, which enforces the fetters, is brought
 into action; and that must be by forms of law. Hence, no act

1. That part of the farm has been sown, and he cannot be removed from the part sown.

This defence will be sustained, to the effect of allowing the heir to reap the crop of that part of the farm which has been sown; but he will be burdened with a proportional part of the rent, to be estimated of course according to the rate of rent paid by the life-rent tenant, not according to the present value of the land.

2. That the farm has been laboured and prepared for sowing.

This defence will be repelled: But the heir will be entitled to the expense bestowed in preparing the ground for the crop; the advantage of which is enjoyed by the proprietor.

2. *Defences of the Sub-Tenant of the Life-rent Tenant.*

1. That he cannot be removed without a warning, in terms of the act 1555, or an action under the Act of Sederunt, called in Court forty days before the Whitsunday preceding the term at which he is to be removed.

This defence, it is thought, for the reasons already stated, would not be sustained, and on this account also, that these regulations had in view those removings only where the term

“in the face of the fetters is *ipso jure* null and void. All such acts are only reducible when challenged.”

of removal was fixed, and might be previously known, and are in no shape adapted to such removings as the present, which seems to be better provided for by the act of 1491, c. 26.

2. That the sub-tenant has not been warned, forty days before Whitsunday, to remove.

This defence resolves into the question, whether the sub-tenant may be removed *de plano*,^a on the death of the liferent-tenant; for unless he can be so removed, a warning or action,^b called forty days before the ensuing Whitsunday, seems necessary. That he cannot be removed *de plano*, is supported, by the analogy of the case of the tenants of liferenters, since the reason of the rule applies equally here. The sub-tenants hold under a title, which forms the distinction between them and the heir; the heir has no right to enter, and, on that account, possession is denied to him; the tenant is in possession on a title; and so much regard does the law pay to a title, that it requires a warning in order to

^a The object of the act 1491, c. 26, was to secure those possessing under a lease from being deprived of possession; and if it be supposed that the liferent tenant dies on the day preceding Whitsunday, to remove the sub-tenant the next day would produce all that hardship which it was the object of the statute to prevent. This is to be prevented in no other way, than by requiring the forty days warning.

^b Perhaps the most regular method, in this case, would be by a warning; which was the practice at the time of the enactment 1491, as this removing does not fall under either the statute 1555, or the Act of Sederunt.

dispossess the tenant; but that warning is a warning adapted to the situation of the tenant, and to the nature of the right, and supported by statute. On this reasoning, the want of a warning forty days before the Whitsunday, after the death of the liferent-tenant, might be fatal to a removing.

Removing on the Promise of the Tenant.

THE tenant, to save trouble, may agree to remove; and, in that case, he ought to give a letter to the landlord, obliging himself to remove, and to dispense with any warning or process of removing. Even a promise to remove, when proved by the oath of the tenant, will be a sufficient ground of removing, without either warning or the calling of an action in Court.*

But where such proof is not brought, a verbal promise, even when attended with preparations for removing on the part of the tenant, will not be sufficient: For the tenant's private knowledge

* Edmonston v. Brysons, 28th July 1744. Kilk. p. 443. Clk. Hume, No. 274. Mor. p. 12415, and Elchies voce Tack, No. 10. Notes, p. 444. In this case, the tenant's verbal promise to remove without warning, was allowed to be proved by reference to his oath, although the pursuer was an apparent heir unentered. The converse had been found in Carlyle v. Lawson, 24th January 1734. Elchies voce Tack, No. 1. Notes, p. 442, where a tenant had removed without a renunciation, and it was found relevant to prove, by the landlord's oath, that he had dispensed with a renunciation. See this case also taken notice of in Kilkerran, p. 443, and Mor. p. 12415.

that the lands have been let to another, his communing with the landlord for a new lease, and a public advertisement of the farm, will not be held as equivalent to regular warning.* Matters, however, must remain entire; for if any thing has followed on the tenant's promise, such, for example, as ceding part of the possession to the landlord, or receiving payment of a certain sum, as a consideration for removing without warning, or receiving another farm on that condition, or being allowed to depart from a prescribed course of cropping;—in all such cases, it is understood that the *rei interventus* bars repentance, and binds the tenant to remove according to his promise.^b

* *Gordon v. Bryden*, 13th January 1803. *Fac. Coll. Mor.* p. 13854. In this case, the landlord had various communings with the tenant during the last year of the lease, about a renewal of the lease; but they could not agree, and the farm was advertised in the newspapers. The landlord afterwards let it to a new tenant, and intimated the transaction to the former tenant by letter, but received no answer. The old tenant afterwards walked over the farm with the new one, as the future tenant. He also sold part of his stock, and dismissed a number of his servants, as if in contemplation of his removal. The landlord pleaded, that these circumstances clearly indicated an intention on the part of the tenant to dispense with warning. But the Court thought all this insufficient to supply the place of regular warning. A similar decision is understood to have been pronounced in the case of the *Town of Perth v. Andrew*, 21st December 1797, *Not reported*.

^b The doctrine here stated, is understood to have been recognised in the following cases. *Majoribanks v. Spottiswood*, 11th July 1795. *Lord Dundas v. ———* 11th July 1796. *Jameson v. Thomson*, 15th June 1802. *None of which are reported*.

It seems proper here shortly to take notice of those cases in which,

Decree of Removing.

AFTER decree of removing has been pronounced, the tenant must not only remove, but he must

from the nature of the subjects let, the statutory warning is not necessary.

I. Urban Tenements and Houses.—Neither the solemnities of the statute 1555, nor of the Act of Sederunt, are necessary in removings from urban tenements. Even a verbal notice, given by the one party to the other, will be sufficient, if it be given forty days before the term of removal, whatever that term may be. *Tait v. Sligo*, 23d July 1766. Fac. Coll. Mor. p. 13864. In this case, the tenant admitted, that the landlord had informed him in the month of December that the tenement was let to another; but he insisted, that although, in urban tenements, the solemnities of the act 1555 are not necessary, yet that certain established forms are required, such as chalking the door by a burgh officer, forty days before the term. The Court, however, seem to have considered, that these ceremonies are regulated very much by local custom; and that it is enough if the material object is answered, viz. that of giving the tenant timeous notice, so that he may provide himself with another house.

In *Jollie v. Stevenson*, 10th July 1781; Fac. Coll.; Mor. p. 13865, it was held to be a sufficient warning to the tenant of a house in the suburbs of Edinburgh, that a town officer gave the usual intimation, by chalking the door forty-one days before the term, although the house was situated beyond the jurisdiction of the Magistrates.

It is the custom in Edinburgh for the tenant, who means to remove at Whitsunday, to intimate his intention to the landlord at the Candlemas preceding; yet where that intimation was not given until the 24th February, the Court held it to be in sufficient time. *Jack v. the Earl of Kelly*, 20th June 1795. Fac. Coll. Mor. p. 13866. From this decision, it seems to follow, that the intima-

leave the possession void. The decree must be obeyed to the full effect, and no apparent remov-

tion, whether from the landlord or from the tenant, will be effectual, if made forty days before the term of removal.

The tenant of a house in the country, to which no land is attached, may also be removed without the solemnities of the act 1555. *Lundin v. Hamilton*, 19th December 1758. Fac. Coll. Mor. p. 13845. But houses let with several acres of land attached to them, are considered as ordinary rural tenements, and require regular warning, forty days before the term of Whitsunday, whatever be the term of removal. *M'Naughton v. Wilson*, 14th February 1765. Fac. Coll. Mor. p. 13857.

In the case of the Duke of Queensberry *v. Telfer*, 11th March 1756; Fac. Coll.; Mor. p. 13843, it was found, that miners, and labourers about lead mines, might be removed on a warning of fifteen days from houses which they possessed rent free under the tacksman of the mines. Here the principal tacksman had been removed on the expiration of his lease; and these miners seem to have been considered neither as cottars nor sub-tenants, but merely as servants, possessing without rent, and removable at will. The fifteen days were allowed, on account of the hardships to which they might be exposed if ejected without any premonition.

II. *Coal Works*.—The act 1555 does not apply to coal works, the tenants of which may be removed on a warning, forty days before the term of removal, whatever term that may be. *Vauchope v. Hope*, 15th December 1767. Fac. Coll. Mor. p. 13847. In this case, the tack of a coal work expired at Martinmas, and no formal warning was given until October. The Court were of opinion, “that the statute did not apply to removings from coal works, and “that no more was necessary than to give timely notice, which had “been done in this case.”

III. *Grass Parks*.—Where grass inclosures are let from year to year, the tenant may be removed without the necessity of formal warning. *Macharg*, petitioner, 9th March 1805. Fac. Coll. Mor. Appendix *voce Removing*, No. 4. In this case, the parks were specially let from Martinmas 1803 to Martinmas 1804. At the last of these terms they were let to another tenant: but the former tenant refused to cede possession, on the ground that he had received no legal warning. A summary application was presented to

ing by the form of instrument, bearing, that the tenant has removed himself and his family, will be admitted. This was decided in a case, where there had been some collusive proceedings between the tenant and a person who immediately seized on the vacant possession.* The tenant removing, must cede the possession to the landlord, to whom he was accustomed to pay his rent, and to no

the Sheriff, for authority to remove him, but this was refused. On an advocacy, however, the Lord Ordinary remitted to the Sheriff, with instructions to remove the tenant; and a petition to the Court, against this interlocutor, was refused without answers.

From the terms of one decision, it might be inferred, that the tenant of an arable farm, let for one year, may be removed without formal warning; but, in that case, there were specialties in favour of the landlord, and against the *bona fides* of the tenant, which must prevent its being regarded as a decision upon the general point. See the case, the Duke of Argyle v. Russell, 7th December 1799. Fac. Coll. Mor. Appendix voce *Removing*, No. 2.

It may, perhaps, be assumed as a safe rule, that warning is necessary in a rural tenement, wherever it is possible, which it certainly is in the case of an arable farm let for one year.

* Greenlaw v. Adamson, 30th January 1624. Durie. Mor. p. 13888. The Court "found, that a decree of removing was not fulfilled by any instrument of obedience, bearing, that the party against whom the sentence of removing was obtained had removed himself and his family from the lands decerned, except that he had also really delivered to the obtainer of the sentence *vacuam possessionem*; for the party decerned, his removing and colluding with another, who entered to the land at the instant of time of his removing, was not effectual obedience, but elusory; neither was it necessary that the obtainer of the sentence should be put to such action of intrusion, or succeeding in the vice against him who entered to the land at the removing of the other, seeing the Lords found that the party decerned ought to deliver the possession of the said houses void of any occupier and possession thereof."

other.* Neither is it enough that the tenant remove himself, he must also remove his sub-tenants, otherwise he will be liable in violent profits.^b Even where the tenant has removed himself and sub-tenants, it will not be held as a sufficient compliance with the decree, if the removing has been made clandestinely without intimation to the landlord; for in this way, another may take possession in his stead, and defeat the object of the removing: But a distinction will be made between the case, where the intruder takes possession immediately on the removal of the outgoing tenant, and that where the possession has been so long void, as that the landlord might easily have known that it was so.^c

These, however, are questions which, in the present state of the law, are not very likely to arise. Were such a case to occur, in addition to his claim against the outgoing tenant, who had been guilty of the collusion, or had neglected the

* Lord Yester v. Murray, 15th December 1630. *Auchinleck. Mor.* p. 13889.

^b Earl of Argyll v. M'Naughton, 16th July 1674. *Stair. Mor.* p. 13889.

^c Budge v. Sir James Sinclair, 21st July 1713. *Forbes. Mor.* p. 13891. "The Lords found it not relevant to assoilzie the defender, that he had removed himself and his sub-tenants from the lands, unless he had left the possession void and redd, or offered the same to the pursuer when void. For, otherwise, they thought him liable *tanquam possessor*, when another entered in his vice, and disappointed the effect of the warning. But the Lords, in their reasoning, made a distinction betwixt possession, occupied by an intruder suddenly after the party removed, and intrusion after the possession had been long void, or so long as the heritor might easily have known it was so."

proper intimation, the landlord would have an action against the intruder as a vitious possessor.*

S E C T. V.

ACTIONS AT THE INSTANCE OF THE TENANT.

THE actions at the instance of the tenant, must be either for the purpose of attaining possession, or

* See form of a *Summons of succeeding in the vice*, Appendix III. See also in the Appendix III. the form of ejection on a decree of removing.

There have been two recent decisions regarding the effect of decrees of removing. By the first, it was found that if the tenant dies after decree of removing has been obtained, but before the decree has been extracted, the landlord may extract the decree and charge the tenant's heirs to remove. Decree of removing in absence had been pronounced on the 4th April; the tenant died on the 15th, after which the landlord extracted the decree, and charged the widow and children of the tenant to remove. It was argued for the heirs, that a *transference* was necessary. But the Court held, that where a party died after decree was pronounced, an action for the purpose of extract was unnecessary, and had never been heard of. Besides, it was said, that the defenders here never had any title of possession at all, and there was no room for tacit relocation as to them. *Earl of Kintore v. Watt and Fowler*, 9th December 1809. Fac. Coll.

By the other decision, it was found, that a decree of removing being once final, although not immediately enforced, the tenant has no lease on which he can maintain himself in possession. In this case there was no written lease, but there was a jotting in the landlord's cash-book, from which it appeared that the lease was to endure for fifteen years from 1802. In the ninth year of this lease, the landlord brought an action of removing against the tenant, on the Act of Sederunt 1756, on the ground that he was in arrear of

for implement of some of the conditions of the lease. Where the granter of the lease continues proprietor, the object of the action may be to attain possession; where, on the other hand, the lease is rendered ineffectual, from defect of power in the granter, the lessee will seek redress in an action of damages against the granter or his representatives. These actions are not very likely to occur; and when they do occur, so much must necessarily depend on the circumstances of the particular case, that it is needless to say any thing here of the forms of such actions.

It may be proper, however, to observe here, that there is a very ordinary transaction between landlord and tenant, which merits the attention of both parties. Where the landlord is bound by the lease to pay the public burdens, it almost invariably happens that these are paid in the first instance by the tenant, who claims corresponding deductions at settling the rent. The regular way of managing this transaction is, for the tenant to deliver to the landlord the re-

rent. In that action, decree of removing was pronounced and extracted, but afterwards the landlord received payment of the arrears, and the tenant continued to possess the farm for another year, when a new action of removing was brought against him. The landlord contended, that even had the jotting in 1802 been a regular lease, yet it was put an end to by the final and extracted decree of removing, and the subsequent possession was merely at will, and not binding beyond one year. The Court were unanimous in thinking that the final decree of removing had put an end to the former lease, and that the tenant had now no title of possession. Grierson, petitioner, 17th November 1812. Fac. Coll.

ceipts for the public burdens paid by him; and the discharge which the landlord grants for the rent ought to specify that so much of the sum was paid in money, and so much accounted for by receipts for public burdens, the vouchers of which were delivered up. Should the landlord, in place of this, receive the voucher as money, and give a discharge for such a sum, without distinguishing the money from the receipts for public burdens, it might come afterwards to be questioned, whether this was not a payment entirely in money, of which the public burdens formed no part; or, should the tenant, on the other hand, pay his rent, without seeking credit for such payments, it might afterwards be inferred that he had been allowed credit for them. Thus, there are dangers on both sides where this transaction is managed carelessly; and, therefore, it is a matter of importance to both landlord and tenant, to express in the voucher, the transaction precisely as it stood.^a

^a *Veatch v. Paterson*, 2d December 1664. *Stair. Mor.* p. 11363. This case proves that the caution here given is not altogether unnecessary. Here the tack contained a clause, relieving the tenant from payment of all public burdens. Two or three years after he had quitted the farm, he claimed from the landlord the amount of all the public burdens he had paid during the currency of the lease. The landlord contended that the presumption was, that all the public burdens were credited at settlement for the rent. The tenant answered, that this presumption could not prevail against the written evidence; and had the landlord given credit for these payments, he ought to have expressed it in his discharge. The Court considered the case to be important as a precedent, and found that the presumption was in favour of the landlord, unless the tenant could in-

Actions at the tenant's instance are more likely to become necessary, for the purpose of compelling the landlord to perform the obligations incumbent upon him by the lease, or to recover damages for their neglect. On this subject, there is one rule which the tenant ought always to recollect, viz. That wherever the landlord is bound to perform any act, such, for example, as to build houses on the farm, or to make enclosures, the non-performance of which will subject him to a claim for damages, the tenant, if the landlord delays to implement his obligation, ought to make a requisition upon him to perform it, under form of instrument. If such a requisition is neglected, and an action at the instance of the tenant, for damages, becomes necessary, it may happen, that the time at which the requisition to perform the obligation was made will be proveable only by the landlord's writ or oath.^a

struct, by the landlord's writ or oath, that these burdens were not credited at settlement for the rent.

^a The Earl of Dundonald v. Alexander, 14th January 1747. Kilk. p. 444. Mor. p. 12415, and 15911. Here the landlord became bound to make enclosures. The tenant continued for many years to pay his rent without requiring these enclosures to be made; at last he suspended a charge for payment of the rent, on the ground that he had sustained considerable damage by the landlord's neglect to make the stipulated enclosures. The Lord Ordinary, in respect of the payment of rent for so long a time, without any requisition to have the ground enclosed, repelled the reasons of suspension, but he ordained the landlord forthwith to enclose the lands, since the tenant now required it. The tenant reclaimed against this interlocutor. On advising a petition and answers, it appeared that the landlord had obeyed the Lord Ordinary's appointment by enclosing the

TACIT RELOCATION.

TACIT relocation is a provision of our law, by which a lease, after the term stipulated for its expiration, is held to be renewed from year to year, under the same conditions, until one or other of the parties, by a legal intimation, signifies his intention of bringing the contract to a close.

This rule is not recognised in the law of England, and has been adopted into our law from the Roman. It was introduced into the law of this country at a time when leases were held in small estimation,—when there was no inducement to change one tenant for another, on account of superior skill or capital,—and when, in fact, few changes were made. The particular state of the country,

ground; and “as to bygones, no regard was had to what was pleaded
 “by the tenant, that, *esto*, he had made no requisition, the landlord
 “was liable; for, though where a particular day is fixed for perform-
 “ance, *dies interpellat pro homine*, and though *quod sine die debetur*,
 “*presenti die debetur*, so that *presenti die peti potest*, yet till requisition
 “is made, *dies non venit*. But all the question was, how far he
 “could be allowed to prove *by witnesses*, that he had made a requisition
 “on the landlord, which he averred he had done. As to which,
 “the rule was agreed to be, that, wherever requisition is necessary,
 “if there be no instrument taken on it, it can no otherwise be proved
 “than by the writ or oath of party, agreeable to what we have in
 “Stair’s Institutes, tit. *Accessory Obligations*. Nevertheless, it
 “was doubted, whether, in this case, there might not be an exception,
 “on account of the rusticity of the party: and therefore he
 “was, before answer, ordained to give in a condescendence of the
 “time when such requisition was made, and of the witnesses by
 “whom he proposed to prove it; and, of this date, he was allowed
 “a proof, before answer.”

and the prevalence of civil law doctrines amongst our lawyers at that time, seem to have led to the adoption of this rule, which, as the commerce of land increased, had the effect of rendering removings more difficult. The ground of this presumption is the want of intimation from either of the parties; and it is not affected by the death or derangement of either of them, though these are events inconsistent with that presumed renewal, or even continuance of intention, which seems to be necessary for the very existence of this presumption. These are circumstances, too, which have induced the commentators on the civil law to doubt whether the relocation could take place under them.

There are, however, certain situations in which tacit relocation is not understood to take place; as, I. Where a principal tacksman has let his farm to a sub-tacksman,—on the expiration of the principal lease, it is held, that there is no ground for tacit relocation.* 2. There is no tacit relocation in judicial tacks of sequestrated estates; for which Mr. Erskine assigns these reasons:—" *First*, " Because there is no deed of the Court interposed " in judicial tacks, from which the consent of the " Judges to continue the lease may be inferred; " for warning is never used by the Court of Session, and it is the omission of this form in voluntary leases, by landlords who are wont to use it, " which is one of the grounds of tacit relocation. " *Secondly*, Because in judicial sales, where the

* Stair, Inst. B. II. tit. ix. § 23. Ersk. Inst. B. II. tit. vi. § 36.

“ tacksman must give security to the creditors for
“ the tack-duties during the lease, the relocation or
“ new lease, cannot subsist on the same precise
“ footing with that which was first granted by the
“ Court, and reduced into writing; for the tacks-
“ man’s cautioner in the lease is loosed from his
“ engagement after the expiration of the term
“ expressed in the judicial tack, to which term
“ only he had bound himself.”^a

Where the common lease contains regulations inconsistent with a lease of one year’s endurance, it may be questioned whether tacit relocation can take place.^b

^a Ersk. Inst. B. II. tit. vi. § 36.

^b See *Supra*, p. 479, as to tacit relocation in the heirs of liferent tenants.

THE END.



APPENDIX I.

DECREE, A. D. 853.

*REMOVING TENANTS, ON ACCOUNT OF THEIR
DETERIORATING LANDS.*

MURATORI, by whom this record is published, gives it, "tum propter multos ritus ad eruditionem ejus temporis spectantes, tum propter latinæ linguæ enormem abusum;" the title which he gives it is, "Placitum in Lucensi urbe habitum, a Johanne Episcopo Pisano et Adalberto Marchione, Missis Ludovici II. Augusti in quo Hieremias Episcopus Lucensis contra quosdam abutentes Emphyteusi litem obtinet, anno 853." The record itself is in these terms: "Dum apud celsam potestatem domni nostri Hludovici magni Imperatoris directi fuissent Johannem venerabilem sancti Pisenensis Ecclesie Episcopus, nec non et Adalbertum Marchionem seu Gausbertum vassum et ministrum minor ipsius Imperialis potestatem, et conjuncti fuissent hic civitate Luca Curte videlicet Ducale, et resedissent in judicio in Sala illa tefestile cum ipsis et nos Rachimbardo Schabinus Florentinensis Urbem, Ardo, Adalberto, Chunimundo, Gherimundo, item Chunimundo, et Andreas Notarius et Schabinus predictæ Lucanæ Civitatis, ubi nobiscum aderant Eribrando, Tuedimundo, Auriperto,



adque Sisimundo vassi Domni Imperatoris, Widelgri-
 mus Gastaldius noster, Ildeberto, Ghisperto, Ildebaldus
 Albolfo, Fraimundo, Wiliperto, Petrus, Fluiperto, Teu-
 perto, Ardolfo, Wittingo, Ato, Fraolmi, Adalfridi, Leo,
 Filuarto, Adalberto, Ghisperto, Auriperto, Warnifridi,
 &c. et reliquos plures. Veneruntque ibi ante nos Hieri-
 mias gratia dei humilimus Episcopus, una cum Teufridi
 Avocatus Domui Episcoporum ipsius Sancti Martini,
 nec non ex alia parte Belisarius Presbiter una cum Leo
 Avocato Suo, Samuele et Aurualdo germanis filii quon-
 dam Anspaldi Clerici, abendum inter se altercationem
 dicendum nobis ipse Teufridi Avocato: *Suprascripti*
Bellisarius Presbiter, Samuel et Ansuald germanis abere
videtur Ecclesia Sancta Marie et Sancti Gervasii cum
casis et rebus ejus, et esse livellum, quomodo eas da quon-
dam Ambrosio antecessore istius Domni Hieremie Pre-
sul eas receperent iste Bellisarius Presbiter, qui tunc cle-
ricus erat, et Samuel germani da parte Sancti Martini.
Sed eandem Ecclesiam, casis et rebus eorum pegiorate
sunt: unde secundum suorum repromissionem a parte
Sancti Martini competit eidem Ecclesiis casis et rebus
ejus perdere debunt. Deinde quero accipere justitia. Dic-
tum hoc fecimus nobis libellum ipsum legi. Contineba-
tur in eum inter ceteros sermones, qualiter sepe dictus
Bellisarius Presbiter, qui tunc clericus erat, et Samuel
germani filii quondam Anspaldi clerici per cartulam
Livellario ordine ab Ambrosius Episcopus dedisset eis
censum persolvendum; idest illa portio de Ecclesia
Sancti Marie et Sancti Gervasii, sita sunt prope murum
istius civitatis Lucane, pertinenens ipsius Episcopatu
Sancti Martini, quas ipse genitor eorum, et quod Teu-
deradus Presbiter ad manus suas abuerunt, cum ourto,
casis domnicatis et Massaricias, quantum ad ipsis curtis,
casis de predictas duas portiones fuerant pertinentes,
et ipse genitor eorum et quod Teuderadus presbiter
abuerant, receperat in integrum tali ordine, ut in suas,
qui supra germani vel de heredibus suis fuissent et per-

mansissent potestatem abendi, posidendi gubernandi, meliorandi, et usufructuandi officium Dei, et luminaria per suas dispositiones in easdem Ecclesiis die noctuque fieri debuisset, rectum moderamine; et ei vel ad successoribus ejus per singulos annos exinde in pascha Domini nostri Jesu Christi ei, vel ad vicedomui, vel ad locho posito suorum a parte Ecclesiis suis Sancti Martini hic Luca in Domo hujus Episcoporum dare et perexolvere debuisset denarios bonos numerum nonaginta per se, aut per Missos suos, et in festivitibus Sancte Marie reddere et dare debuissent ad primicerium ejus, vel quale Misso illis ibi direxissent, medietatem offertas et candelas, que in ejus festivitibus ibi datas et offertas fuissent de ipsa suorum portionem; et de secundo in secundo anno eis et sacerdotibus seu clerum suum quarta feria post pascha Domini gustarem unum ibi facere et dare debuisset cum Vallerino Presbiter, quomodo antea consuetudo fuerat de ipsa Ecclesia faciendi. Et quis de eis suprascripti germani sine herede mortuus fuisset, tunc ipsa ejus portio, qui de eis vivus fuisset, in eorum et de heredum suorum revertisset potestate in suprascripto ordine habendi. Et si ita non adimplissent, et conservassent, sicut supra legitur, aut si predictas portiones seu casis et rebus, quas ei dederant, pegiorata fuissent, et omnino non fecisset qualiter supra promiserat spoponderas eis ipsis germanis, et suis heredibus componere eidem Ambrosii vel ad successoribus ejus penam argentum solidos quadringentos, sic tamen si Ansualdo germanus eorum ad suam legitimam etatem pervenisset, et in suprascripta convenientia cum eis stare et permanere voluisset, vel ejus heredibus licentia habuisset, sicut unus de eis in omnibus, qualiter supra legitur, in suprascripto ordine. Et legatur scriptum fuisset libellum ipsum per manus Andree Notarii, regnante Domno nostro Hlotario Imperatore Augusto anno Imperii ejus, postquam in Italia ingressus esset, vigesimo secundo (A. D. 844.) Nonas Martii, In-

dictione Septima. Roboratum erat a testibus, et post traditum completum.

Libellum ipsum relectum, interrogavimus jam dicto Ansaldo, si ipse in jam dicta convenientia de supradicto livello stare et permanere voluisset an non. Set ipse Ansaldo statim dixit, quod in eadem convenientia de suprascripto livello stare et permanere voluisset, nec unus de aliis germani sui. Cum hoc ita dictum fuisset, interrogavimus jam dicti germani, sive Leo Avocato Supradicti Bellisarii Presbiteri, si Ecclesiis seu casis et rebus eorum postquam eas per jam dicto libellum acceperat, peioratas essent, an non. Ecclesiis et rebus ejus abuissent vel tenuissent, vel si ipsa jam fata convenientia fecissent, sicut in ipsum legebatur libellum, autsi Ecclesiis, casis et rebus eis, quas per ipsum libellum acceperat, peioratis essent, an non. Set ipsis germanis et Leo avvocato professi dixerunt, quod Ecclesiis, casis et rebus ipsis abuissent et tenuissent, et ipsa convenientia fecissent, et peiorata non essent. Refertum hoc, tunc ipse Dominus Hieremias Episcopus, obtulit Brevem unum ubi continebatur inter ceteros sermones, qualiter Dominus Hludivicus gratia Dei Imperator Augustus investissimi Domni Hlotharii filius omnibus fidelibus suis notum esse volebat quia Johannem venerabilem Episcopum et Adalbertum dilectum Marchionem suum, nec non Gausbertum Vassum, et ministros suos, Missos suos constitutos abuisset, ut quicquit ex Episcopatum Lucense attractum invenissent, tam Tuscie partibus quam Romanie, diligentissime sup sacramento per inquisitionem investigare studissent, atque secundum ipsam inquisitionem diffinissent. Si vero aliqua orta fuisset contemptio, que deliberare ibi menime potuissent, sub wadia firmisque fidjussoribus hoc ante suam venire fecissent presentia. Precipientes vero jam dictis Missis suis, ut ita per omnia ipsam jussionem suam adimplere decertassent, sicuti gratiam suam abere cupissent, et ut hoc certius credidisset, de anulo suo supter jusserat sigellari. Brevem ipsum

relectum, dicebat ipse Teufridi eorundem Johanni Episcopi, Adalberti, et Gausberti Vassi Domni Imperatoris: *Certe, si vos vultis ipsa inquisitio facere, sicuti Dominus Imperator vobis mandavit, nunc certa invenitur veritas, quomodo Ecclesiis, casis et rebus ipsis prejorate sunt.* Tunc ipsi Missi Domni Imperatoris denominati, hominibus hic sunt Uggo, Ildo germani Aroghisi, Deusdedit, Popo, et Teuderado germanis, sicut fecerunt venire presentia qui hoc sciebant, et unusquisque eos jurare fecerunt ad dei Evangelia, ut quicquid exinde sciret, certa in omnibus eis dicere veritate. In primis Uggo dixit. *Scio de Ecclesia Sancte Marie et Sancti Gervassi, quia postquam de ipso livello accepta fuit, quia nunc prejorate sunt.* Ildo similiter dixit, &c. Post ea igitur inquisitio facta et sacramenta deducta, et envenissent ipsi Missi Domni Imperatoris, quod taliter ipsis pejoratis essent: interrogaverunt jam dictis Bellisarium Presbiter, et Leo Avocata ejus, sive Samuel et Ansualdo Germanis, si forsitan aliquit aberet, quod adversus ipsos homines contradicere, aut si eos reprobare poterent, an non. Sed ipsis Bellisarius Presbiter et Leo Avocata suo, adque Samuel et Ansualdo germani dixerunt, quod eos reprovare non poterint, nec nullam abuisset quod aversus ipsos homines contradicere aut aliqua approvatione facere potuissent. Professio ac facto recolectis nobis in unum Judicibus, paruit nobis recte una cum reliqui nobiscum ibi adesentibus, et inventa causa invenimus, quod Ecclesiis ipsis prejorati essent. Ita judicavimus et wadia dare facimus ipsum Samuel et Leo Avocato jam dicti Bellisarii Presbiteri, sive Ansualdo germano eorum, propterea quod ipse Ansualdo staret in ipsa convenientia de ipsum libellum, et unus de aliis germanis suis eidem Teufridi avvocato per ipsum libellum repro-miserat, a parte ipsius Episcopatu Sancti Martini componere illos quatringentos soledos, quod ibi legebatur, et fecimus ei dare wadia, esset paratus ab eis compositio

ipsa recipere. Et dum talia hec omnia ab ordine factum fuisset, tunc optulet jam fato Domnus Hieremias Episcopus Preceptum unum a Domino ipsissimo Hludovicus Imperator facto, ubi legitur, et nobis ostenso, quas ipsi Missi Domni Imperatoris legi fecerunt, ubi continebatur.

In nomine Domini nostri Jesu Christi, Dei eterni Hludovicus gratia Dei Imperator Augustus, Invictissimi Domni Imperatoris Hlotharii filius. Omnibus fidelibus Sancte Dei Ecclesie, hac nostris, presentibus scilicet et futuris notum sit, ad aures mansuetudinis nostri esset perventum, qualiter Pontifex Sancte Lucensis Ecclesie rebus ipsis pertinentibus tam pro immunitatem, quamque etiam proprio lucro per libellos, hac fiduciarius, aliisque conscriptionibus, quibusdam hominibus dedisset unde nunc maximum damnum prefata patitur Ecclesia, adque Rector et Pastor ejusdem Ecclesie nostrum dignissime non valeat peragere servitium. Nos vero utilitatem jam dicte Ecclesie Pastorem ipsius necessitatem providentes Hieremi, cui ipsum dedimus Episcopatum, hoc nostrum preceptum fieri jussimus pro securitate, et concedimus, omnes res sue Ecclesie recipere, adque secundum suam utilitatem disponere; omnes vero libellos, omnesque scriptiones inde factos, irritos et vacuos esse statuimus, simulque etiam cunctas ordinationes adnihilatas phore sancimus, sive Clericis sive Laicis sive etiam Feminis, ut inde modo retineat secundum hoc nostrum preceptum, irritum sit: atque prefatas Hieremias Pastor ejusdem Ecclesie, nostra auctoritate omnia ad nos recipiat, et secundum quot visum fuerit, ad suam suaque Ecclesia disponat utilitatem. Nam quicumque aliquit de jam dictis rebus absque voluntate et concessionem prefati Hieremie quocumque modo retinuerit, sciat se nostrum incurrere offensione. Et ut hoc ab omnibus certius credatur, ac diligentius observetur, de anulo nostro subter jussimus sigillari.

Dructemirus sacri Palatii Notarius recognovi

Data Quintum Nonas Octobris, anno Christo propitio Imperii Domni Hlotharii pii Augusti trigesimo tertio, et Hludowici Imperatoris in Italia Tertio, Indictione Prima (A. D. 852.)

Actum Curte Turiola Palatio Regio in Dei nomine feliciter. Amen.

Preceptum ipsum relectum, tunc ipsi Missi Domni Imperatoris mandaverunt nobis, ut quicquid exinde nobis rectum apparuisset, eidem Hieremie a parte ipsius Episcopatui Sancti Martini renuntiassimus. Et ideo nobis paruit esse rectum una cum omnibus nobiscum ibi adesentibus, ita ei renuntiavimus, ut juxta ipsum preceptum, quod Dominus Imperator ei concesserat, predictis Ecclesiis cum rebus suis abere deberent parte Ecclesie Sancti Martini cujus proprietas esse videbatur. Unde hanc notitia Judicati pro securitate partem Ecclesie Sancti Martini fieri previdimus, ut in eadem maneat deliveratione, et Petrum Notarium scribere admonuimus, Anno Imperii Domni nostri Hlotharii magni Imperatoris, postquam in Italia ingressus est, Trigesimo primo et filio ejus Dominus noster Hludovicus idemque Imperator, Anno Quarto, mense Aprile, Indictione Prima,

’ Ego Ardo Schavinus ivi fui

Ego Adelpertus Schavinus ivi fui

Ego Chunimundo Schavino ibi fui

Ego Tuedimundo ibi fui

Ego Adalmanno ivi fui

† Signum manus Albolfi ibi fuit, &c.

APPENDIX II.

FORMS OF THE LEASE.

OF THE FORM OF THE LEASE PROPOSED BY LORD KAIMS.

IN speaking of the conditions by which it has been proposed to restrict the operations of the tenant, and to secure a plan of management, that may preserve the farm in the highest state of cultivation, the plan proposed by Lord Kaims has been mentioned. But before giving the form of this lease, it is proper to preface it with some observations made on it by an eminent practical agriculturist. Dr. Anderson, in his *View of the Agriculture of Aberdeenshire* says, “ He (Lord Kaims) assumes it as a postulatam, that a landlord and tenant are capable of forming a tolerable just estimate of the value of the land in question, for a short period of years, such as it is customary to grant leases for in Scotland, say 21 years; and having agreed upon these terms, which, for the present, we shall call £100 of rent, the tenant expresses a wish to have his lease extended to a longer period. To this the proprietor objects, on this ground, that it is not possible to form a precise estimate of what value the ground may be, at the end of that period. He has already seen, that ground, for the last 21 years, has increased much

“ more in value than any person at the beginning of
“ that period could easily have conceived it could have
“ done, and therefore he cannot think of giving it off
“ just now, for a longer period, as a similar rise of value
“ may be expected to take place in future. This rea-
“ soning appears to be well founded, and therefore, to
“ give the landlord a reasonable gratification, he pro-
“ poses that it should be stipulated, that if the tenant
“ should agree to give a certain rise of rent at the end
“ of that period, suppose £20, the landlord should con-
“ sent that the lease should run on for another period
“ of 21 years, unless in the cases to be after men-
“ tioned.

“ But, as it may happen that this £20, now stipulat-
“ ed to be paid at so distant a period, may be more
“ than the farmer will find he is able to pay, an option
“ shall be given to him to resign his lease, if he should
“ find it the case, by giving the landlord legal notice,
“ one year, at least, before the expiry of the lease.
“ But if that notice be omitted thus to be given, it shall
“ be understood that the tenant is bound to hold the
“ lease for the second 21 years, at the rent specified in
“ the contract. And if the landlord does not give the
“ tenant warning, within one month after that period,
“ it shall be understood that he, too, is bound to accept
“ of the stipulated rent, for the 21 years that are to
“ succeed.

“ It may, however, also happen, that the sum speci-
“ fied in the lease, may be a rent considerably below
“ the then present value of the farm; or the proprietor
“ may have very strong reasons for wishing to resume
“ the possession of that land, or to obtain an adequate
“ rent for it: A power, therefore, should be given to
“ him in either case, to resume the lands, if he should
“ so incline. But, as a great part of that present value
“ may be owing to the exertions of the farmer, who
“ has laid out money upon the farm, in the hopes of

“enjoying it for a second term of 21 years, it would
“be unjust to deprive him of this benefit, without
“giving him a valuable consideration for that improved
“value. On this account, it should be stipulated, that
“in case the proprietor, at this time, resumes the farm,
“he shall become bound to pay to the tenant, ten
“years purchase of the additional rent he had agreed to
“pay, which, in the example above stated, would be
“£200 Sterling.

“But the land may be worth still more than the £20
“of rise mentioned in the lease, and the tenant may be
“content to pay more, say £10, rather than remove,
“and he makes offer accordingly to do so. In that
“case, the landlord should be bound either to accept
“that additional offer, or to pay ten years purchase of
“that also, and so on, for every offer the tenant shall
“make, before he agrees to remove from the farm.

“In this way, the landlord is always certain that he
“can never be precluded from obtaining the full value
“for his land, whatever circumstances may arise. And,
“if the tenant should prove disagreeable, so that he
“would wish rather to put another in his place, upon
“the same terms, it can never be any hardship upon the
“landlord to pay the stipulated sum, because it would
“be the same thing to him, as if he bought a new estate
“at ten years purchase, free of taxes, a thing he never
“can expect to do. It is indeed true, that it would be
“more advantageous to allow the present tenant to
“continue; and, therefore, this alternative will be al-
“ways (unless in very extraordinary cases) accepted of;
“as it ever ought to be, and thus the tenant’s mind is
“impressed with a conviction that ought ever to pre-
“vail, because it stimulates to industry in the highest
“degree.

“And as the tenant is thus certain, that, at the very
“worst, his family must be entitled to draw a reason-
“able remuneration for the exertions of his industry,

“ he can never find the smallest tendency to slacken his
“ endeavours in any way.

“ By stipulating in the original lease, in the same
“ manner that at the end of the second 21 years, the
“ lease shall be continued for 21 years more, and so on
“ at the end of the third and fourth, and any farther
“ number of periods, of 21 years; on agreeing to pay a
“ specified rise of rent, reserving to each party the
“ same privileges as above described, the lease might
“ be continued to perpetuity, without either party
“ ever being in danger of having an undue advantage
“ over the other. The tenant will always be certain of
“ having a preference given him over every other per-
“ son, and will, of course, go on with unceasing exer-
“ tions to better his land, which will, of necessity, tend
“ to augment the income of the proprietor, much more
“ than could have happened under any other system of
“ management.”

A Lease, on the Plan proposed by
LORD KAIMS.

IT IS CONTRACTED, AGREED, AND ENDED, betwixt A
B, heritable proprior of the subjects hereby set, ON
THE ONE PART, and C D ON THE OTHER PART, in
manner following; THAT IS TO SAY, The said A B
has SET, and, in consideration of the yearly rent and of
the other conditions herein contained, SETS, and in TACK
and ASSUEDATION LETS, to the said C D, and to his heirs,
whether heirs by law or by nomination, for which he
has full power, notwithstanding any exception herein
contained (but expressly excluding assignness, legal and
conventional, and sub-tenants), ALL and WHOLE the lands
of , lying within the parish of
and shire of ; TOGETHER also with a power

of working all quarries of stone, lime, gravel, and sand, within the said farm, for the purpose of erecting buildings thereon, or for improving the farm, but not for sale, or for the purpose of gifting or disposing thereof to others; WITH POWER ALSO to the said C D of cutting down and disposing of the whole trees, old and young, growing or to grow, on the lands hereby set, during the whole years and space for which this lease shall endure, as the same may be extended in virtue of the powers herein contained, with the exception of such tree or trees as the proprietor shall from time to time fix on, and which trees, so fixed on, the tenant shall have no right to cut down, but shall suffer to remain during the whole currency of the lease; these trees not exceeding in value one-tenth of the value of the whole trees growing on the lands at the time; the said C D being always bound to leave trees growing on the farm at the expiration of the lease, of equal value with those at present growing there, or to pay their value in manner herein after provided for. AND WHICH LEASE shall endure for the complete space of TWENTY-ONE YEARS and crops, from and after the entry of the said C D thereto, which is hereby declared to be, (*here the term of entry to the houses and pasture, and to the arable land, will be expressed*). AND WHICH period of endurance shall be always renewable in manner herein after provided for; RESERVING to the said A B, his heirs and assignees, full power to search for and work coal, and metals and minerals of every kind, to quarry lime and freestone, and to dig marle in any part of the lands hereby let, and to apply the same to his or their use; WITH POWER ALSO of making roads or of building houses necessary for such operations; the proprietor being always obliged to pay to the tenant all the damage that he may sustain by the exercise of these powers, as the same shall be determined by arbiters to be chosen in manner after mentioned; RESERVING ALSO power to

the said A B and his aforesaid, to straight and alter the marches of the said lands with those of the adjoining lands; and if it shall happen, in consequence of such alteration of the line of march, that any ground shall be taken from the said farm or added thereto, then the rent of such grounds shall be ascertained by arbiters to be chosen in manner foressaid; and the same shall form either an addition to the rents of the said lands, or a deduction therefrom, as the case may happen: WHICH TACK above written, the said A B BINDS and OBLIGES him, his heirs and successors, under the reservations foressaid, to WARRANT to the said C D and his foresaid, at all hands and against all deadly, as law will: and for that purpose, in case of a transference of the property of the said lands, to bar the purchaser from doing any deed inconsistent with the present lease: AND FURTHER, the said A B does hereby BIND and OBLIGE himself and his foresaid, to build, on an eligible part of the lands hereby set, a good farm-house, with barns, stables, byres, abeda, and other out-houses, agreeably to a plan signed by him as relative hereto, the expense of which shall not exceed the sum of £ Sterling: AND FURTHER, the said A B BINDS and OBLIGES himself and his foresaid, when required, to make a ring-fence round the arable lands of , and also a middle or division-fence to run through the said lands, the expense whereof shall not exceed the sum of £ Sterling: AND FURTHER, the said A B BINDS and OBLIGES himself and his foresaid, to use their utmost endeavours to obtain leave to bring water from the nearest points of the rivulet called , or from the river of , to the highest part of the lands of , for the purpose of flooding, watering, or irrigating, the lands; and in case leave shall be obtained, then the said A B, or his foresaid, shall make a proper water-course for carrying the water for the purposes foressaid; FOR WHICH CAUSES, AND ON THE OTHER

PART, the said C D BINDS and OBLIGES himself, his heirs, executors, and successors whomsoever, to PAY to the said A B, his heirs or assignees, or to his or their factor, THE SUM OF £ STERLING OF YEARLY RENT, for the subjects hereby set, at the terms of Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said rent at the term of Whitsunday , and the next term's payment at the term of Martinmas thereafter for crop and year , and so forth, yearly and termly, during the currency of this lease, with a fifth part more of each term's rent of liquidate expenses, in case of failure, and the legal interest of each term's rent from and after the respective terms of payment during the not-payment of the same: AND ALSO to deliver yearly to the said A B or his foresaids, turkeys, geese, and hens, or the sum of £ in lieu thereof, at the option of the said A B and his foresaids: AND FURTHER, the said C D BINDS and OBLIGES him and his foresaids to pay to the said A B and his foresaids, interest, at the rate of 5 per cent. per annum, on such sum or sums as the said A B or his foresaids shall have expended in building the farm houses, barns, and others, agreeably to the plan above mentioned, or in erecting the ring-fence or middle division-fence before mentioned, or in making the water-course above mentioned, or in other buildings erected on any part of the said farm for the accommodation and at the desire of the said C D; the said interest to be paid half-yearly amongst with the said rents, and to be in fact an additional rent, beginning the first term's payment at the first term of Whitsunday or Martinmas after the advance shall have been made, and continuing the same at every subsequent term of Whitsunday and Martinmas, as an additional rent for the said lands, with penalty and interest in manner foresaid, in case of the not punctual payment thereof: AND FURTHER, the said C D hereby BINDS and OBLIGES him and his foresaids, that, during the con-

tinuance of this lease, he or they shall reside on the said farm, and manage the lands in a good husband-like manner; and shall use and consume the whole of the straw and fodder that shall be raised on the farm in and upon the same; and shall employ on the said farm, according to the best of his judgment, the dung, muck, compost, or other manure that shall be made thereon; and shall not, during the currency of this lease, nor at the expiration thereof, dispose of any part of the said straw, fodder, dung, muck, or compost, or any other manure whatever; nor shall he carry the same, or any part thereof, off the farm; excepting always from this regulation, the hay to be raised on the said farm, of which the tenant may dispose at pleasure, unless restrained by the express requisition of the landlord, who is hereby entitled to make such requisition during the

years preceding the termination of this lease; all of which articles, under this exception, the said tenant shall leave on the farm at the termination of the lease, to be disposed of by the landlord to the incoming tenant, at a value to be fixed by arbiters mutually chosen in manner foresaid, and to be paid to the outgoing tenant: AND FURTHER, the said C D BINDS and OBLIGES himself and his foresaids, that they shall not, during the continuance of this lease, raise above two successive crops of any of those sorts of grain usually known by the name of white corn, the principal of which are wheat, oats, barley, and rye, from any part of the said lands, without the intervention of some kind of green crop with or without a fallow complete, unless by the permission of the said A B or of his foresaids: AND FURTHER, the said C D BINDS and OBLIGES himself and his foresaids not to deteriorate or run out the lands hereby set, but to restore them at the expiration of this lease in good heart and condition; AND IN RESPECT that the houses at present on the farm have been valued by persons chosen by the said parties, and found to be

worth the sum of £ Sterling, which houses the said C D is at liberty to keep up or take down at pleasure: AND FURTHER, as the fences and enclosures on the said farm have been valued, and found to amount to the sum of £ , to which sum shall be added the amount of what shall be laid out by the said A B or his foresaids in making the said ring-fence, or middle and division-fence, which sums, when added together shall be held to be the present valuation of the fences on the farm: AND FURTHER, as the said C D has, by this lease, a right of disposal of the whole trees growing or to grow on the said lands, with the exception of the trees to be reserved by the proprietor, but under an obligation to leave growing on the farm, trees of equal value with those at present growing there, a valuation has therefore been made of the whole trees, as at the commencement of this lease, and the value of the same has been found to amount to the sum of £ : THEREFORE, it is hereby specially agreed upon between the said parties, that at the dissolution of this lease, at whatever period that may happen, there shall be valuations made by arbiters, to be chosen in manner after provided for, of the houses then on the farm, exclusive of those to be built in terms of the conditions of this lease, and of the fences on the said farm, and of the trees growing there, including the reserved trees; and if it shall be found that the value of the houses, fences, and trees, has decreased in the course of the present lease, the amount of such decrease shall be paid by the said C D and his foresaids, to the said A B and his foresaids; but if the value of the said articles shall be found to have increased, then the amount of the increase shall be paid to the said C D or to his foresaids, by the said A B and his foresaids, and these payments shall be made on or before the term of payment of the last crop under this lease: AND FURTHER, as the said A B has become bound to build other houses on the lands hereby set, as marked on the plan above

mentioned, the said C D BINDS and OBLIGES himself and his foresaids, to uphold and keep the same in repair during the currency of this lease, he being liable no farther than that the diminution in the value of these last mentioned houses shall not exceed the common and ordinary decay of such buildings and erections, according to the length of time they may have stood at the expiration of this lease: AND FURTHER, the said C D BINDS and OBLIGES him and his foresaids, at their own expense, to INSURE for his own behoof, and for behoof of the said A B, the said houses built and to be built, with the crop in the barn-yard, against losses by fire, to the extent of

£ Sterling; AND DECLARING, that the said C D and his foresaids shall be liable for any loss from fire sustained by the houses on the farm while they continue in his or their possession under this lease: AND FURTHER, in case water shall be brought to the said farm, in manner and for the purposes aforesaid, then and in that case the said C D BINDS and OBLIGES himself and his foresaids to preserve and keep in repair the said water-course, on their own expense, during the currency of this lease: AND FURTHER, the said C D BINDS and OBLIGES himself, on the expiration of this lease, at whatever time that shall happen, to renounce and give up the possession of the said farm, and of the houses thereon, with its whole parts and pertinents, to the said A B and his foresaids, or to their tenants whom they mean to possess the farm, and to remove therefrom peaceably and quietly, without any warning or process of removing for that purpose: AND it is hereby further CONTRACTED and AGREED UPON between the said parties, that although the said C D and his foresaids be hereby taken bound to reside on the said farm, yet in case of the lease coming into the person of a female or of a minor, (in either of which events the assistance of a manager may be necessary), the obligation to reside on the farm shall be dispensed with while the necessity of having a manager exists, provid-

ed that he, during the period of his management, shall reside on the farm: AND FURTHER, although sub-leases are hereby prohibited, yet this prohibition shall not exclude the tenant from setting off small tenements, for the accommodation of servants and labourers to be employed in the operative part of labouring the said farm; this exception to the prohibition to sublet being in no case to be extended farther: AND as it is the intention of the parties to this lease to continue the period of endurance thereof from time to time, provided they can agree upon the rent to be paid for such continuation of the period of endurance, THE FOLLOWING REGULATIONS are hereby LAID DOWN for attaining this object; and the same are hereby DECLARED to be BINDING and EFFECTUAL against the said parties respectively, and their foresaids, viz. FIRST, If no intimation be made previously to the term of Martinmas, in the year , by the landlord to the tenant, or by the tenant to the landlord, declaring a contrary intention, THEN and in that case, it shall be held to be their intention to continue the endurance of this lease for another space of twenty-one years; and accordingly, this lease shall be held to continue in force for another space of twenty-one years, commencing at the expiration of the first twenty-one years, and that without the necessity of entering into any new written obligation; BOTH PARTIES hereby mutually binding themselves to each other, to perform the whole conditions hereby incumbent on them respectively during the second period of twenty-one years; with this variation only, that in place of the yearly rent of £ Sterling, and of the additional rent, composed of the interest on the different advances, as the same shall be made, in terms of the foregoing conditions, the rent of the second period of twenty-one years shall amount to the yearly rent of the former period, whatever that may have been, and to per cent. thereof more, payable at the terms, and with interest, and under a penalty, as above ex-

pressed. **SECOND**, That if intimation shall be made by the tenant previous to the said term of Martinmas in the year , that he does not mean to continue in the possession of the said farm for any farther period than during the space of the first twenty-one years, **THEN** this lease shall be held to expire at the end of the first twenty-one years, and the tenant shall be bound to remove at that term, agreeably to the regulations above written relative to his removing. **THIRD**, That if, in place of intimating his intention to remove at the expiration of the said first space of twenty-one years, the tenant shall, previously to the said term of Martinmas , make an offer of continuing to possess the said farm for a second space of twenty-one years, at a rent below the above-mentioned augmented rent, stipulated to be paid for the second space of twenty-one years, the landlord shall have three calendar months, from the said term of Martinmas, to consider of the offer; and, if the landlord shall not, within that time, return an answer to the tenant, intimating his refusal to agree to such proposal, he shall be held to have accepted thereof, and the tenant shall continue to possess the said lands for the second term of twenty-one years, at the new rent specified in his offer, and under all the conditions of this lease, the said new rent being payable at the terms, and with interest and penalty, in manner above expressed. **FOURTH**, That it shall in like manner be in the power of the landlord to intimate to the tenant, previous to the said term of Martinmas in the year , his intention not to let the farm for the second period of twenty-one years, so low as the additional per centage; and if the tenant shall not make any farther offer within three calendar months after the said term of Martinmas, **THEN** the foregoing lease shall terminate at the expiration of the said first space of twenty-one years, (and which intimation on the part of the landlord shall be held to be a sufficient answer to any pro-

posal that may have been made by the tenant for lowering the rent in terms of the foregoing conditions): But if within the said three calendar months the tenant shall make an offer of a still higher rent, the landlord shall be at liberty to refuse or to accept thereof, as he may think proper; PROVIDING, that in case he shall refuse the offer of the tenant, he shall, within the space of twenty days from the date of the said offer, intimate his refusal to the tenant, who shall still have another opportunity of offering for the same, provided his offer be made within the like space of twenty days from the date of the landlord's refusal; and if the landlord shall still refuse to accept of the tenant's offer, and intimate his refusal to the tenant within ten days of such second offer, THEN this lease shall EXPIRE at the end of the first twenty-one years: BUT in that case the landlord shall PAY to the tenant YEARS PURCHASE MONEY of such additional rent as the tenant shall have offered, over and above the stipulated rent of the first twenty-one years; AND if, on the tenant's offer of an additional rent, no refusal shall be given by the landlord within twenty days of the tenant's offer, the same shall be held to be received; AND in that case, OR if the landlord shall consent to receive the offer, the lease shall continue for another space of twenty-one years, and the new rent payable for the farm for that period shall be the sum contained in such offer, payable at the terms, and with interest and penalty, in manner above expressed: AND it is hereby expressly AGREED by the said parties respectively, for themselves and their foresaids, that the intimations and answers made by the one party to the other, shall in all cases be made under the form of a notarial instrument; and if the party be residing at the time at his ordinary place of residence, and access can be got to him, intimation shall be made personally; but if he be not residing there at that time, or if access to him be refused, a schedule of intimation shall be left with his servant in

his dwelling-house, and intimation shall also be made to his factor, or to the person usually employed in the management of his law-affairs; or if the party or parties shall happen to be in minority at the time, then intimation shall be made at the party's common place of residence, in manner foresaid, by an intimation to the tutor or curator of the minor; or if they shall have neither tutor nor curator, to the minor's factor, or to the person usually employed in the management of their law-affairs. AND FURTHER, it is hereby AGREED upon, between the said parties, that this lease shall continue in force, after the expiration of the second period of twenty-one years, for another period of twenty-one years; and so on at the expiration of each period of twenty-one years, for a new period of twenty-one years, the rent after the expiration of the second period of twenty-one years, being always increased, every new period of twenty-one years, at the rate of *per cent.* more than the rent of the immediately preceding period; the parties on all and each of these renewals, possessing the same powers of retracting, or of increasing or diminishing the rent, as on the termination of the first period of twenty-one years; AND the term of Martinmas preceding the last crop of each of the subsequent periods of twenty-one years after the expiration of the first period, shall be the term from which the different intimations shall be made, in the same manner that the term of Martinmas is declared to be in regard to the intimation at the expiration of the first period of twenty-one years: AND if the said tenant shall, at any time, in terms of the foregoing conditions, be deprived of his lease, by the landlord's declining to accept the rent offered by the tenant, THEN, and in that case, the tenant shall be entitled to receive from the landlord five years purchase of such sum as the tenant shall have offered, over and above the rent of the period then about to expire: AND it is hereby expressly DECLARED and AGREED to by the parties, That in all

renewals of this lease, made in virtue of the powers herein contained, the whole conditions herein expressed shall be binding on both parties respectively, in the same form and manner, as during the currency of the first space of twenty-one years, and that without the necessity of renewing this deed, but simply by adhibiting their consent to the continuation of the lease in any of the ways hereby pointed out; EXCEPTING the case where the lease comes to be continued in the person of an heir, in which case it shall be in the power of the landlord to require the tenant to become a party to a new lease, in the same terms with the present: AND FURTHER, each heir of a tenant, on his succeeding to this lease, shall be bound to execute a new lease, of the same terms with the present one, binding himself personally, in the same manner as the said C D is hereby bound: AND FURTHER, in case of any disputes as to the true intent and meaning of this lease, or of any clause or condition thereof, or for performance of any obligation herein contained, or in regard to the management of the farm, or for making the necessary valuations of buildings, fences, and trees, in terms of the foregoing conditions, it is hereby AGREED, that the same shall be REFERRED, and all and each of them are hereby REFERRED, to the FINAL SENTENCE and DECREE-ARBITRAL of two farmers in the neighbourhood, one to be chosen by each party, and in case of their variance, to the decision of a third farmer, as oversman, to be chosen by the said arbiters; with power to them, or to the said oversman, to give out and pronounce a decree-arbitral on the matters submitted to them, within the space of two months from the date of their nomination respectively; which DECREE-ARBITRAL the said parties BIND and OBLIGE themselves, their heirs, and successors, to implement to each other respectively; AND in case the arbiters or oversman shall neglect to pronounce a decree, within the space of two months from the date

of their respective appointments, THEN, and in that case, their powers shall be at an end, unless prorogated by the mutual consent of both parties; AND when the powers of the arbiters or oversman shall thus have expired, without their pronouncing a decree-arbitral, from any of the parties not having stated their plea, or given that information which may have been required by the arbiters or oversman; OR in case either of the parties, when required to name an arbiter, shall have declined so to do for the space of one month; THEN, and in either of these events, the other party, who by such neglect may be forced to bring an action before a court, shall be entitled to recover from the defender, the whole expense which shall be incurred in such action, and which he shall have paid to his own agent, and that independently altogether of the decision of the court in regard to the expense of such process: AND it is hereby DECLARED, that the amount of the account of expenses paid to the agent, with his receipt therefor, shall constitute the charge against the party liable therein, in terms of the above regulation, and shall be a sufficient warrant for diligence to that extent in terms of the clause of registration herein contained; and of which diligence no suspension shall be competent, the parties hereby renouncing all objections that can possibly be brought against such charge: BUT DECLARING, that these submissions shall in no case extend to any act or deed of the parties which shall have taken place more than a year before the appointment of the arbiters in manner foresaid, all claims and demands competent to either party against the other, from any act of omission or commission, on either part, ceasing, by the lapse of a year, to be the ground of claim or demand, and being no longer a competent ground of action, in a court of law, or otherwise. AND LASTLY, Both parties BIND and OBLIGE themselves and their foresaids, to implement their respective parts of the premises to each other, under the penalty of £ Sterling, to be paid by

the party failing to the party observing, or willing to observe the same, over and above performance; AND they CONSENT to the REGISTRATION hereof, and of the awards, reference to oversman (if such shall be made), and decrees-arbitral, to be pronounced hereon, in the books of Council and Session, or in other judges books competent, to have the strength of a decree of the judges thereof interponed hereto, that letters of horning on six days' charge, and all other execution necessary, may pass hereon in form as effeirs; and thereto they CONSTITUTE

their procurators, &c. IN WITNESS WHEREOF, &c.

In this lease, assignees and sub-tenants are excluded; but it is one object of such a lease, to enable the tenant to undertake the necessary improvements, with a confidence that the money which he employs on his farm is fully secured to him; and many cases may be conceived, where, without the power of assigning or subsetting the farm, he or his family must suffer. To obviate this difficulty, and to enable the tenant to transfer his lease without injury to the landlord, it is suggested, that a transference of the right might be permitted, under a power given to the landlord of rejecting the person offered for his acceptance, on paying to the creditors or heirs of the tenant the sum which the person rejected may have agreed to pay for the benefit of the lease.

In this way, the tenant will be enabled to command the full value of his lease in those situations where, in justice, that value ought to be at his command, and what he receives will be precisely commensurate to the value of his interest in the lease; nor can the landlord complain of such a change, since there is no consideration he may urge which can come in competition with the substantial interest which the heirs or creditors of a tenant have to plead. The object might be attained by such a clause as the following; "AND as assignees and
" sub-tenants are hereby expressly excluded, THERE-

"FORE, in order to do justice to the tenant, should his
 "affairs happen to fall into disorder, or should the state
 "of his family, at the event of his death, render it ne-
 "cessary to convert his interest in the lease into money,
 "it is hereby expressly PROVIDED and DECLARED, that
 "in the event of the tenant's being rendered bankrupt,
 "it shall be in his power, or in the power of his credi-
 "tors, or, in the event of his death, it shall be in the
 "power of those appointed by him to act for his heirs,
 "either by his appointment, or on cause shown, to rounp
 "the lease; and the person preferred at the rounp shall
 "be presented to the landlord for acceptance, and if he
 "shall be accepted of, he shall pay to the heirs or credi-
 "tors of the tenant the sum offered by him; and in vir-
 "tue of an assignation from the tenant, or from those
 "empowered by him to act for his heirs, with the con-
 "sent of the landlord adhibited thereto, the assignee
 "shall be fully invested with all the rights and privileg-
 "es, and he and his heirs (by law or by nomination)
 "shall be bound to all the conditions hereby incumbent
 "on the tenant, and if the landlord shall desire it, he
 "shall enter into a new lease, executed in the same
 "terms with the present. But should the landlord re-
 "ject such tenant (which he is hereby empowered to
 "do), THEN, and in that case, he shall be bound, as he
 "is hereby bound, to make payment to the heirs or cre-
 "ditors of the said tenant of the sum of money, or an-
 "nual payments, which ever they may be, which the
 "person rejected had become bound to pay, in case of
 "his being accepted by the landlord, and the lease shall
 "from thenceforth be extinguished, and the landlord
 "be entitled to the full possession of the lands."

This clause, if it were agreed to, and should it be
 thought capable of attaining the object, will be inserted
 before the clause agreeing to submit.

In considering the effect of this lease, the regulating
 power is obviously the right enjoyed by the tenant of

offering an additional rent, and should the offer be rejected, his title to claim from the landlord so many years purchase of the additional rent. It is thus the tenant is secured in his possession, or entitled to an equivalent; while the landlord is enabled to redeem his farm.

There are, however, many points in this transaction of infinite delicacy. Thus the rise that may take place on the value of a farm in the space of twenty-one years, may be owing to many different causes; a depression in the value of money—the establishment of a manufacture in the neighbourhood, which occasions an increase in the population—a canal, which affords water-carriage—an improvement in agricultural machinery, or in the practice of agriculture; all these will affect the value of the farm, and the value arising from one and all of these causes is to be considered as the fair property of the landlord, in which the tenant can claim no interest; while at the same time it seems, to be the opinion of those entitled to judge of it, that the plan of management which such a lease would enable the tenant to adopt, must materially increase the value of the farm. How to distinguish between these, at any time, must be difficult, but to determine the point by anticipation, and to fix a sum as the rise of rent corresponding to the natural increase in the value of the farm, at the expiration of every period of twenty-one years, with any chance of approaching nearly to the truth, may certainly be deemed an impossibility.

Farther, when the term of twenty-one years expires, there will, in the general case, be a contest between the landlord and tenant, which of them shall derive the advantage arising from the increased value of the farm. Now, if it were possible to separate the value arising from the individual exertions of the tenant from the value arising from other causes, the tenant is in equity entitled to a large proportion of what has arisen from his own exertion. But when, in place of this, his recompense is

made to depend on so many years purchase of what he shall offer of additional rent, it seems natural to imagine that he may be induced to go farther lengths than in prudence he ought to do; for should an offer, made by him with a view to his recovering a high indemnification, in case of his being turned out be accepted of; then, the rent payable by the tenant will be so far increased as to deprive him of that recompense to which his industry and success entitled him. In short, in this way the whole increased value would go to the landlord. There is an additional circumstance which may assist in producing this effect, and that is, the attachment to his farm which a tenant so situated will naturally acquire, and the anxiety to prosecute the plans which he may be supposed to have commenced, and to view with partiality.

If, again, we suppose the tenant to adhere to such an offer as will secure to him (if he be continued in possession) a proper recompense for his improvements; then the chance is that he may be turned out, and receive only a small sum corresponding to the offer he has made, and in this way, as well as in the other, he will be deprived of his just rights.

It is the circumstance of the tenant's being deprived of his recompense, by too high an offer, should it be accepted of, or by too low a one, should it be refused, that creates the great delicacy in ascertaining, on the part of the tenant, the offer which he ought to make, and beyond which he ought not to go.

At the same time a check exists on the landlord, for should he refuse to accept of the offer made by the tenant, he pays a certain premium to the tenant. Now, by accepting of the tenant's offer, he has the rent which the tenant agrees to pay, without any purchase money; whereas, if he turns him out, he must, to indemnify himself, receive from a new tenant not only the rent offered by the outgoing tenant, but as much more as

will be worth the premium which he must pay to the outgoing tenant.

This proves that the number of years purchase of the additional rent payable by the landlord, in case of his removing the original tenant, is the great object to be ascertained, and the point on which the justice and success of the plan must depend.

But farther, should this plan of a lease be rendered practicable, it will come to be a material question, how far such a lease is effectual against a purchaser, or heir of entail. In the case of a sale, the seller will have himself to blame, if he does not render the lease binding on the purchaser; that can be done by the terms of his disposition, and being within his own power, any danger from the rights of a purchaser may be considered as forming no objection to the measure. But the situation of a proprietor under an entail is different, and should a lease of this kind not be effectual against a succeeding heir of entail, the tenant will have recourse on the granter, or his representatives.

Clause of a Berwickshire Lease with respect to the mode of Cropping, &c. taken from the Juridical Styles, Vol. I. p. 668.

AND FURTHER, as to the houses and fences on the farm, the said B is to accept of them in the condition they may happen to be in at his entry; but, in regard many of the houses will require to be repaired or rebuilt, the proprietor is to allow the sum of £ on the whole, for repairing and rebuilding the same in a permanent manner, and that in such sums and at such times as the tenant shall instruct, the same has been laid out on a plan to be approved of by the proprietor or his doer, previous to the execution of such repairs; it being understood and specially agreed to, that all kinds

of carriages, and straw for thatch, is to be furnished by the tenant, and is to become no part of the charge against the landlord: AND from and after the entry to this lease, or after such repairs have been executed, the tenant is to keep the whole of the houses and fences in good tenantable order and condition yearly during the tack, and to leave them in such good order and condition at the end thereof, or at his removal, all at his own proper charges and expenses, without any allowance from the proprietor whatever, farther than to the extent aforesaid, provided the same be laid out in manner above mentioned; and if at any time the tenant shall neglect to keep the said houses and fences in good order and condition, the proprietor hereby reserves power to employ workmen to execute such repairs when and where necessary, and to charge the tenant with the cost thereof: AND the said B binds and obliges himself and his fore-saids, to labour, manure, and crop the lands hereby set in a proper and regular manner; and, without prejudice to the generality of this clause, he is in no period of the lease to have above one-half of the arable land in tillage, and one-fourth of the tillage must be yearly in fallow or turnips, and must be properly manured with dung or lime, at the rate of bolls of shell lime, or cart-loads of dung; the other three-fourths may be white corn, but oats is not to succeed wheat, nor is wheat to succeed oats, nor is oats to succeed oats above once, and that only when land is new broke out of lee, and no wheat is to be sown but after fallow; all the lands laid to grass must be sown off with a sufficient quantity of clover and rye grass seeds, not less than ten pounds weight of white, four of red clover, and one fir-lot of rye grass seeds to the acre, and that with the first crop after fallow: AND at the end of the lease, the whole of farm must be left as part of the grass lands three years old, and the hill south from , must also be left as part of the grass land two years old. No part of the grass

land is to be hayed above once after being sown off; and for every stone of hay sold off the farm, the tenant must lay on a cart load of lime, and that in the same year such sale is made.

The great depression in the money value of agricultural produce which took place some years ago, and the consequent hardship on tenants who had stipulated to pay, during a long lease, a money rent corresponding to the price of grain at the date of their leases, induced many proprietors at that time to insert clauses in their leases, regulating the rent by the fiat prices of grain. The following is an example of such a clause.

“ AND FURTHER, seeing that the principal reason for granting a lease, to endure for the period of years, is to encourage the tenant to execute improvements of a more effectual nature, and in a better manner, and thereby to enable him to pay a greater rent than he could do with a short or uncertain term of possession; and seeing that it is also equitable to prevent both landlord and tenant from suffering loss at an after period, from any remarkable change in the relative value of money and land produce, particularly corn, it is therefore stipulated, that if, during the first seven years of this lease, the average price of corn, viz. of wheat, barley, and oats, according to the fiars of the shire of , shall be different from its average price, according to the said fiars, during the seven years immediately preceding the commencement of the lease, then, and in that case, the rent of each of the second seven years of the lease shall vary, that is, be increased or diminished accordingly.”—(*Instead of the word “accordingly,” the following may be substituted—“in the proportion of one-half, two-thirds, or any other proportion to be agreed upon, of the difference between the averages.”*)—“ And if, during the second seven years of the lease, the average price of the same species of grain, by the

“ said fiars, shall be different from its average fiar price
 “ during the first seven years of the lease, then, and in
 “ that case, the rents of each of the remaining years of
 “ the lease shall, in like manner, vary, that is, be in-
 “ creased or diminished accordingly.”—(Or say—“ in
 “ the proportion of the difference between the average
 “ fiar price, during the said first seven years, and the
 “ second seven years of the lease,” &c.)

By such a clause, the rent, or any proportion of it that the parties choose, would come, in the progress of a lease of ordinary endurance (as for 19 or 21 years), to be regulated by the prices of grain. If the word “ *accordingly* ” be used, it will, after the first seven years, have much the same operation as a rent payable wholly in corn would have; not however delivered in kind, but converted into money, according to the average fiar prices, during a term of years (whether seven, ten, or any other number). Should the other form of expression be preferred, then, not the whole rent, but any proportion agreed on, would be regulated in a similar manner.

The same depression in the money value of land produce which rendered such clauses as the preceding necessary, induced some proprietors to grant deductions from the rents stipulated in current leases. The following is the form of a deed of this description, which was executed by a proprietor of large estates in Scotland, containing also a clause, varying, as to the mode of cropping, the terms of the leases previously granted :—

*Deed of Restriction of Rents, on the occasion
 of the recent Depression in the Value of
 Agricultural Produce.*

I, A B, CONSIDERING that the tenants and possessors of my farms, contained in the lists hereto annexed, took

their possessions some years ago, when grain and other produce of land was at a higher price, and became bound to pay corresponding high rents; and whereas, for crop and year 1814, and the present crop and year 1815, grain and cattle have fallen so considerably, that the said tenants cannot continue to pay the stipulated rents out of the produce of their farms, unless a deduction corresponding to the fall in the price shall be given by the proprietor from the said rents, so long as grain and other produce continue at the present depressed prices; and being reluctant to distress my tenants, and desirous to restore public confidence and credit, so far as lies in my power, I have resolved, THAT IS TO SAY, I, the said A B, do hereby agree to convert the respective money rents specified in the schedule No. 1, hereto annexed, originally stipulated to be paid by my said tenants, into a grain rent, at the average rate of nine shillings *per* bushel of wheat, being nearly the average of the price of wheat at the time they took their several farms, to which all other farm produce bears nearly a relative proportion; and for crop and year 1814, when wheat sold at about six shillings *per* bushel, and for the current year 1815, when it scarcely brings that rate, to deduct from each tenant's rent one-third of the money rent originally stipulated to be paid by him; and for all future crops, during the continuance of my life, and so long as the said leases are current, to accept and take from each of my said tenants, a rent in wheat, calculated at one shilling *per* bushel below the average returns of wheat for each crop, as the same shall be ascertained by the London Gazette, in terms of the late Act of Parliament for regulating the importation of grain, the *maximum* of rent never exceeding the rate of nine shillings *per* bushel, and the *minimum* never falling under six shillings *per* bushel; that is to say, for each £3: 12s. of the former money rent stipulated to be paid by each tenant, he shall pay the price of one quarter of wheat, to be calculated at

the rate of one shilling *per* bushel below the average ascertained by the London Gazette, being the average price of each crop; provided always, that the said average price does not exceed the said sum of nine shillings *per* bushel of wheat, nor fall below the said sum of six shillings, it being my clear and distinct meaning and understanding, that in no event the rent shall ever exceed the money rent stipulated in the original tacks and minutes of agreement; and that this abatement shall subsist only during my lifetime, and the currency of the said leases; but that nothing herein contained shall be binding on my successors in my said entailed estate, or infer any warrandice against my executors, or other representatives: AND WHEREAS, by several of the leases and agreements between me and my said tenants, they are restricted from taking two white crops running from any part of their farms, which they complain of as a hardship, especially after breaking up old grass grounds; and being satisfied that an alteration in this respect will be of no prejudice to the farms, THEREFORE I do hereby consent and agree, that my said tenants may take two white crops running, from any part of their farms that has been properly laid down in grass, and has lain in pasture for not less than six preceding crops; provided they clean, fallow, and manure, in a proper manner, such ground so to be broken up, the first year after taking said two white crops, and then restore the same again to grass after a regular rotation; recommending to all my said tenants to turn a greater proportion than hitherto of their farms into pasture as soon as possible, and to keep the same in grass for a period not under the space of six years; being satisfied that the system of pasturage will, in general, be more beneficial to them than that of constantly cropping their farms, and will save them a great expense, equal to a further abatement of rent on my part: BUT I HEREBY DECLARE, that except with regard

to the money rent as hereby altered, and taking two white crops after breaking up from old ley, no other deviation or alteration whatever shall take place upon any of the other conditions and stipulations contained in the original tacks, or minutes of agreement entered into between me and my said tenants, which are hereby declared to continue and subsist in the same manner, and as fully in every other respect, as if this deed of restriction had not been entered into: AND WHEREAS all my tenants are not in a similar situation with those specified in said schedule No. 1, many of the others having taken their farms before the late rise in produce took place, and at lower rates, and under different circumstances, and so are not entitled to an equal abatement, yet from the fall in produce some of these may suffer great loss; THEREFORE, I HEREBY DECLARE, that all the tenants specified in schedule No. 2, hereto annexed, shall be allowed, for crops 1814 and 1815, the respective deductions specified in said schedule from their stipulated rents; and that in all future years the deduction shall continue, but shall rise and fall according to the foresaid scale; THAT IS TO SAY, when the price of wheat in the county of , to be ascertained as aforesaid at the rate of one shilling *per* bushel below the average in the London Gazette, is at or below the rate of six shillings *per* bushel, the tenants specified in said schedule shall be allowed the yearly deductions therein contained; but when wheat, to be ascertained as aforesaid, rises from six to nine shillings *per* bushel, so the said abatement shall proportionally diminish, and be altogether at an end, when wheat attains the average rate of nine shillings *per* bushel; BUT ALWAYS with and under the several provisions and conditions above specified, applicable to the tenants contained in schedule No. 1, annexed hereto, which shall be equally in force and applicable to those contained in the schedule No. 2,

also annexed: BUT PROVIDING ALWAYS, as it is hereby expressly PROVIDED and DECLARED, that as my purpose and intention, in executing this deed of restriction and agreement, is to confer a substantial favour and benefit on my tenants above named, and referred to in the schedules hereto annexed, and with the confident hope of enabling them to bear the difficulties and pressure of the times, maintain their possessions, and cultivate their farms properly, for their own future advantage, combined with mine as their landlord; yet, if it should so happen, that any of my said tenants should still be unable, notwithstanding what I have thus done for their benefit, to clear off and discharge the whole arrears of rent now due by them, and to become due for crop 1815, so that I shall still be laid under the necessity of prosecuting legal measures against them and their estates and effects, then, and in that event, my whole aforesaid legal claims and demands upon them, and rights of preference competent to me as proprietor of the said farms, for all arrears of rent, are hereby reserved entire, and declared to be in full force and effect, it being nowise my intention to surrender or diminish the same in any respect, so as to benefit the creditors of my said tenants, but only themselves personally and individually; AND I CONSENT to the registration hereof, and of the two schedules hereto annexed, in the Sheriff-court books of _____, or other competent register, for publication and preservation; and CONSTITUTE _____ my procurators, for that effect. IN WITNESS WHEREOF, &c.

To this deed two schedules were subjoined, applicable to certain classes of tenants upon the estate. In any similar deed, these schedules will, of course, be regulated by the particular circumstances in which the landlord stands with respect to his tenants.

Instead of loading this Appendix with more examples of the forms of leases, it seems better to put down here the heads of some clauses which may be necessary. The propriety of adopting any or all of them, must depend upon the circumstances of the particular case; and when any such clauses are to be adopted, no man of business can have difficulty as to the technical form of expressing them.

1. Clause as to the seclusion or admission of assignees and sub-tenants, legal or voluntary.

2. Clause, fixing the term of endurance, and terms of entry, with reference to the questions which may arise about away-going crops—the tenant's right to keep possession of the barns for threshing out and disposing of the last crop, &c.

3. Breaks in the lease, or a mutual privilege to renounce the lease at certain periods in the course of it.

4. Reservation of mines and minerals, sea-ware, &c. and of power to erect public works, and, in that event, to have certain accommodations for the workmen, &c. on indemnifying the tenant.

5. Reservation of privilege of hunting and shooting, and of fishing; and also a power to confer those privileges on others, on paying the damages which the tenant may sustain.

6. Clause as to rent, and the terms of payment of it, with reference to the questions that may arise, on the death of either of the parties, between their heirs and executors.

7. Clause regulating the rent according to the fair prices of grain.

8. Clause astringing the tenants to the mills to which the lands are astringed.

9. Clause relative to meliorations or deteriorations of the houses and buildings on the farm; obligation on

the tenant to leave the houses, &c. in good repair, the ordinary decay occasioned by time excepted.

10. Where new houses are to be erected, whether by landlord or tenant, upon what plan, and where they are to be erected by the tenant, and how he is to be paid for them.

11. Clause relative to the destruction of the houses by accidental fire, by whom in that event are they to be rebuilt? and if by the tenant, how is he to be repaid? Obligation on the tenant to insure houses, offices, and farm-stocking against fire.

12. Obligation on the tenant to preserve the planting under a penalty, and to allow certain portions of the farm to be planted by the landlord.

13. Rotation of crops, and plan of management. How is the tenant's obligation to be enforced? If by an additional rent, is the tenant to have the power of departing from the prescribed course, on paying the additional rent? Or is the landlord to have the power in case of a deviation of exacting the additional rent; and also of preventing farther contravention? In the latter case, it might be proper to insert a clause, empowering the landlord, on the discovery of an intention on the part of the tenant to deviate from the prescribed course, to apply summarily to the Judge Ordinary, to have it enforced.

14. Regulations as to consuming the straw and fodder, and laying the dung of the last year of the lease on the lands, or making it over to the incoming tenant at a certain rate, to be fixed by arbiters mutually chosen.

15. Obligation on the tenant to stock the farm fully, and to keep it so.

16. Obligation on the tenant as to march dikes and fences; these to be kept in proper repair, and failing the tenant's doing so on regular requisition, the landlord to have power to do so at the tenant's expense.

17. Obligation on the tenant to perform certain services, such as furnishing horses and carts at certain times to the landlord or his factors.

18. Power of subsetting or assigning, either directly or indirectly. Whether the tenant is to have the power of appointing his successor in the lease, by *mortis causa* deed 'or otherwise? Whether he may appoint a manager for behoof of his infant heir?

19. Provisions for the bankruptcy of the tenant. Is bankruptcy to be a nullity, or are the creditors to have the benefit of the lease in any shape, either by appointing a manager for their behoof, or otherwise? If not, and if bankruptcy is to annul the lease, how is the tenant, or how are his creditors, to be indemnified for meliorations, when this forfeiture is incurred early in the lease, and after large sums have been expended in improvements? Is such an irritancy to be purgeable, and how?

20. Clause obliging the tenant to remove without warning or process of removing.

21. Mutual obligation to refer disputed points to arbiters to be mutually appointed; and failing such appointment on either side, a clause empowering the Judge Ordinary, on the application of either party, to appoint persons to settle differences, whose award shall be final.

It may be useful to subjoin examples of an *Obligation to grant a Tack*, and of a *Minute of Tack*. The *Obligation*, with an acceptance by the tenant, ought to be holograph of the parties. Both the *Obligation* and the *Minute* should be followed, as speedily after their execution as possible, by regular leases. Even after possession, no execution can follow upon either of them, until they have been stamped.

other part, the said C D BINDS and OBLIGES himself, and his heirs, executors, and successors whomsoever, to content and pay to the said A B, and his heirs and assignees, the sum of £ Sterling yearly, at two terms in the year, and , by equal portions; beginning the first half-yearly payment at , and the next at thereafter, and so on during the course of this lease, with one-fifth part more of each term's rent of liquidate penalty in case of failure.—(*Here insert the obligations as to management, repairs of houses, fences, drains, &c.; obligation to remove, &c.*)—AND BOTH PARTIES BIND and OBLIGE themselves and their foresaids, to perform their respective parts of the premises to each other, and to execute a formal tack upon stamped paper, containing the usual clauses, under a penalty of £ Sterling, to be paid by the party failing to the party performing, or willing to perform the same, over and above performance. IN WITNESS WHEREOF, &c.

1997, p. 144-145, 146-147, 148-149, 150-151, 152-153, 154-155, 156-157, 158-159, 160-161, 162-163, 164-165, 166-167, 168-169, 170-171, 172-173, 174-175, 176-177, 178-179, 180-181, 182-183, 184-185, 186-187, 188-189, 190-191, 192-193, 194-195, 196-197, 198-199, 200-201, 202-203, 204-205, 206-207, 208-209, 210-211, 212-213, 214-215, 216-217, 218-219, 220-221, 222-223, 224-225, 226-227, 228-229, 230-231, 232-233, 234-235, 236-237, 238-239, 240-241, 242-243, 244-245, 246-247, 248-249, 250-251, 252-253, 254-255, 256-257, 258-259, 260-261, 262-263, 264-265, 266-267, 268-269, 270-271, 272-273, 274-275, 276-277, 278-279, 280-281, 282-283, 284-285, 286-287, 288-289, 290-291, 292-293, 294-295, 296-297, 298-299, 300-301, 302-303, 304-305, 306-307, 308-309, 310-311, 312-313, 314-315, 316-317, 318-319, 320-321, 322-323, 324-325, 326-327, 328-329, 330-331, 332-333, 334-335, 336-337, 338-339, 340-341, 342-343, 344-345, 346-347, 348-349, 350-351, 352-353, 354-355, 356-357, 358-359, 360-361, 362-363, 364-365, 366-367, 368-369, 370-371, 372-373, 374-375, 376-377, 378-379, 380-381, 382-383, 384-385, 386-387, 388-389, 390-391, 392-393, 394-395, 396-397, 398-399, 400-401, 402-403, 404-405, 406-407, 408-409, 410-411, 412-413, 414-415, 416-417, 418-419, 420-421, 422-423, 424-425, 426-427, 428-429, 430-431, 432-433, 434-435, 436-437, 438-439, 440-441, 442-443, 444-445, 446-447, 448-449, 450-451, 452-453, 454-455, 456-457, 458-459, 460-461, 462-463, 464-465, 466-467, 468-469, 470-471, 472-473, 474-475, 476-477, 478-479, 480-481, 482-483, 484-485, 486-487, 488-489, 490-491, 492-493, 494-495, 496-497, 498-499, 500-501, 502-503, 504-505, 506-507, 508-509, 510-511, 512-513, 514-515, 516-517, 518-519, 520-521, 522-523, 524-525, 526-527, 528-529, 530-531, 532-533, 534-535, 536-537, 538-539, 540-541, 542-543, 544-545, 546-547, 548-549, 550-551, 552-553, 554-555, 556-557, 558-559, 560-561, 562-563, 564-565, 566-567, 568-569, 570-571, 572-573, 574-575, 576-577, 578-579, 580-581, 582-583, 584-585, 586-587, 588-589, 590-591, 592-593, 594-595, 596-597, 598-599, 600-601, 602-603, 604-605, 606-607, 608-609, 610-611, 612-613, 614-615, 616-617, 618-619, 620-621, 622-623, 624-625, 626-627, 628-629, 630-631, 632-633, 634-635, 636-637, 638-639, 640-641, 642-643, 644-645, 646-647, 648-649, 650-651, 652-653, 654-655, 656-657, 658-659, 660-661, 662-663, 664-665, 666-667, 668-669, 670-671, 672-673, 674-675, 676-677, 678-679, 680-681, 682-683, 684-685, 686-687, 688-689, 690-691, 692-693, 694-695, 696-697, 698-699, 700-701, 702-703, 704-705, 706-707, 708-709, 710-711, 712-713, 714-715, 716-717, 718-719, 720-721, 722-723, 724-725, 726-727, 728-729, 730-731, 732-733, 734-735, 736-737, 738-739, 740-741, 742-743, 744-745, 746-747, 748-749, 750-751, 752-753, 754-755, 756-757, 758-759, 760-761, 762-763, 764-765, 766-767, 768-769, 770-771, 772-773, 774-775, 776-777, 778-779, 780-781, 782-783, 784-785, 786-787, 788-789, 790-791, 792-793, 794-795, 796-797, 798-799, 800-801, 802-803, 804-805, 806-807, 808-809, 810-811, 812-813, 814-815, 816-817, 818-819, 820-821, 822-823, 824-825, 826-827, 828-829, 830-831, 832-833, 834-835, 836-837, 838-839, 840-841, 842-843, 844-845, 846-847, 848-849, 850-851, 852-853, 854-855, 856-857, 858-859, 860-861, 862-863, 864-865, 866-867, 868-869, 870-871, 872-873, 874-875, 876-877, 878-879, 880-881, 882-883, 884-885, 886-887, 888-889, 890-891, 892-893, 894-895, 896-897, 898-899, 900-901, 902-903, 904-905, 906-907, 908-909, 910-911, 912-913, 914-915, 916-917, 918-919, 920-921, 922-923, 924-925, 926-927, 928-929, 930-931, 932-933, 934-935, 936-937, 938-939, 940-941, 942-943, 944-945, 946-947, 948-949, 950-951, 952-953, 954-955, 956-957, 958-959, 960-961, 962-963, 964-965, 966-967, 968-969, 970-971, 972-973, 974-975, 976-977, 978-979, 980-981, 982-983, 984-985, 986-987, 988-989, 990-991, 992-993, 994-995, 996-997, 998-999, 1000-1001, 1002-1003, 1004-1005, 1006-1007, 1008-1009, 1010-1011, 1012-1013, 1014-1015, 1016-1017, 1018-1019, 1020-1021, 1022-1023, 1024-1025, 1026-1027, 1028-1029, 1030-1031, 1032-1033, 1034-1035, 1036-1037, 1038-1039, 1040-1041, 104

I. DILIGENCE ON THE LEASE.

Extract Registered Tack.

* The form of expressing this part of the extract has changed, even from the time of Bileton; after stating the appearance of the procurator, he goes on in these words: "Et exhibuit dictum chirographum petitique illud inseri "et registrari in libris Concilii et Sessionis, ut vim sententie dictorum do-
minorum obtineret ei interponendum; qua literis conuocationis et alias ne-
cessarias desuper dirigantur modo inibi specificato; quam postulationem
dicti Domini rationi consonam iudicauerunt, ideoque ordinare et ordinant
dictum chirographum inseri et registrari in libris dicte curie, et decre-
vere illud obtinere vim sententie ipsorum et literas conuocationis et alias
necessarias inde dirigi modo infrascripto." These terms will serve to ex-
plain what is now meant by being recorded in terms of law.

signed, and gave in the contract of lease underwritten, DESIRING the same might be registered in their Lordships' books, conform to law; WHICH DESIRE the said Lords found reasonable, and ORDAINED the same to be done accordingly, whereof the tenor follows; (*here the lease is engrossed verbatim with its subscriptions,*) EXTRACTED upon this and the preceding pages of stamp paper.

signed by a Clerk of Session.

This extract will, of itself, during the lifetime of the party, be a sufficient warrant for letters of horning. But where this registration has taken place in the books of an inferior court, in order to obtain the letters, a bill must be presented to the Lords, praying for a warrant for them. This warrant is granted of course, and the bill becomes the authority for signeting the letters, creating on them some immaterial changes, which shall be taken notice of as they occur in the example to be given. An extract from the books of any inferior court is a sufficient warrant for a charge on six days, and this charge may be followed by poinding, but not by imprisonment. It will also be observed, that when the tack has been registered in inferior court books, six days must elapse before it is competent to present a bill for letters of horning.

Horning and poinding on a Tack.

GEORGE THE FOURTH, by the grace of God, of the united kingdoms of Great Britain and Ireland, King, Defender of the Faith, To

messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting; WHEREAS (*when the horning passes on a bill, this is expressed,* WHEREAS, it is humbly meant and shewn to us, by our Lovite A B, THAT by lease, of date, &c.

and in place of OUR LOVITE, COMPLAINER will be substituted, as the person complains by bill) by lease, of date

entered into by OUR LOVITE A B, on the one part, and C D on the other part, our said Lovite, in consideration of the yearly rent, and other prestations therein mentioned, SET, and in tack and assedation LET to the said C D and his heirs, ALL and WHOLE (*here the lands will be described as in the lease*); and that for all the days, years, and space of years, from and after the said C D's entry thereto, which was thereby declared to have been at the term of as to the houses, yards, and grass; and as to the arable land, at the separation of the crop from the ground. BUT RESERVING ALWAYS to our said Lovite certain powers and privileges therein specified, under which reservations he bound himself in absolute warrandice of the said lease. FOR WHICH CAUSES, and on the other part, the said C D thereby BOUND and OBLIGED him and his foresaids, to dwell and reside on the said farm, with his family, during the said tack; AND he further BOUND and OBLIGED himself, his heirs, executors, and successors, to content and pay to our said Lovite, his heirs or assignees, or to his or their factors, for their behoof, the yearly tack-duty after-mentioned (*here the rent and the terms of payment will be specified*), besides the expense of enclosing as therein mentioned; AND that under an irritancy of the lease, as therein particularly expressed; reserving power to our said Lovite, notwithstanding the said irritant clause, of raising all manner of diligence for recovering the said rent, after the respective terms of payment thereof: AND FURTHER, the said C D BOUND and OBLIGED him and his foresaids, over and above payment of the said rent, to FREE and RELIEVE our said Lovite and his foresaids, of all ministers' stipends, and schoolmasters' salaries, payable out of the said lands, and likewise the cess, road-money, and other public burdens, to be laid out with the cess, during the currency of the

said lease, and for that purpose, either to make payment yearly, to the minister of _____, of the sum of £ _____ and to procure his receipt for the same, and to the schoolmaster of _____, the sum of _____, in lieu of the tenant's share of the schoolmaster's salary; or OTHERWISE, to make payment of the said stipend and schoolmaster's salary to our said Lovite and his fore-saids, to enable them to operate their relief, beginning the first payment of the said money-stipend at _____ and of the victual-stipend betwixt Christmas _____ and Candlemas _____, for crop and year _____, and so forth yearly and termly thereafter, during the currency of the said lease; and of the cess, or land-tax, highway-money, rogue-money, and other public burdens, chargeable, or to be laid on with the cess, in proportion to the lands thereby set, according to the valuation thereof; declaring the first payment to have commenced at midsummer quarter _____, and so forth, termly and yearly thereafter, as the same shall fall due, and become payable: AND FURTHER, the said C D BOUND and OBLIGED himself and his foresaids, yearly, if demanded, to deliver to the complainer _____ good capons, and _____ good hens, for which they are to receive, on delivery, _____ for each capon, and _____ for each hen; and in case of his failing to deliver the same to our said Lovite, when required, he became bound to pay to him at the same rate, for each capon and hen undelivered (*here such other conditions as the tenant may have come under will be expressed*): AND LASTLY, the said parties BOUND and OBLIGED themselves to implement the premises *hinc inde* to each other, under the penalty of £ _____ Sterling, to be paid by the party failing to the party observing, or willing to observe, his part of the lease, (*where the letters pass on a bill, say*), which lease was duly registered in the Sheriff-court books of _____, (*or whatever the place of registration may have been*), and a decree of the Sheriff-depute thereof interponed thereto, on the day of _____, as the same, having the said Sheriff's

precept in the end thereof shown to our Lords of Council and Session hath testified, (*but when the tack has been recorded in the books of Session, say*), as the same duly recorded in our books of Council and Session, and having a decree of the Lords thereof interponed thereto, of this date, ordaining these our letters and other necessary execution to be directed thereon, more fully bears. OUR WILL IS HEREOF, and we charge you, that on sight hereof, ye pass, in our name and authority, lawfully command and charge the said C D personally, or at his dwelling place, to make payment and delivery to our said Lovite, or to his factor, for his behoof, of the money and victual rents before specified, and to implement, pay, fulfil, and perform, the whole prestations and obligations incumbent on him by the said tack,* (the terms of payment of the said rent, and performance of the said other prestations and obligations being always first come, and bygone); AND ALSO to make payment of the said sum of £ Sterling of penalty, after the form and tenor of the said tack and decree interponed thereto, in all points, WITHIN SIX DAYS next after he is charged by you thereto, under the pain of rebellion, and putting him to the horn; wherein, if he fail, the said space being elapsed, that immediately thereafter you denounce him our rebel, and put him to the horn, and use the whole other order against him prescribed by law: FURTHER, that ye lawfully fence, arrest, apprise, compel, poind, and distrain, all and sundry the said C D's readiest moveable goods, of whatever denomination, MAKE PENNY thereof, to the avail and quantity of the said sums, and see our said Lovite completely paid and satisfied of the same, ACCORDING TO JUSTICE; (*when the letters pass on a bill, say here, because the Lords have seen the registered tack above mentioned*), as ye will

* This will authorise a charge to perform any of the specific obligations contained in the lease; but it may be as well to make this part of the will special, and to repeat the terms of the obligations.

said lease, and for that purpose, either to yearly, to the minister of £ and to procure his receipt for the schoolmaster of the tenant's share of the school OTHERWISE, to make payment schoolmaster's salary to our saids, to enable them to open the first payment of the salary of the victual-stipend between dilemas, for crop and termly thereafter lease, and of the rogue-money, and to be laid on thereby set, acting the first quarter ter, as the FURTHER and his compl whir po d , standing can take place only where the tenant is charged to pay a precise sum, but cannot be resorted to for enforcing performance of an act.

Taking, then, the case where the letters are to be enforced by imprisonment, and on the supposition that the tenant has been denounced rebel, and the letters and executions recorded, a bill is prepared in the following terms:

Bill for Letters of Caption.

My Lords of Council and Session, unto your Lordships, humbly means and shews your servitor A B, That upon the day of , C D was duly

APPENDIX III.

and thereof shown to our Lords of Council and Session, and has been testified (by which it has been duly ascertained) that the said C D is the same duly

of Council and Session, and has been duly ascertained that the said C D is the same duly

our letters and other necessary letters, more fully bearing out the right of the said C D, that on a right

person, more fully bearing out the right of the said C D, that on a right

person, more fully bearing out the right of the said C D, that on a right

person, more fully bearing out the right of the said C D, that on a right

person, more fully bearing out the right of the said C D, that on a right

denounced rebel, and put to the horn, by
 letters of horning, raised and executed at
 against him, for not making payment to
 £ Sterling, (or he may have been
 certain obligations, and in that case
 the terms of the execution), together
 of penalty, incurred through fail-
 and due by a tack, of date ,
 D and me, on the one and
 duly registered in your Lord-
 ee of your Lordships inter-
 been recorded in inferior
 duly registered in the
 the precept of the
 manner more fully
 ing, as the same,
 registered here to shew,

645

APPENDIX III.
 and thereof shown to our Lords of Coun-
 testified, (but when the tack has been
 of Session, say, as the same of
 of Council and Session, and have
 of interpreted the reason of
 and other necessary of a
 fully bears. On a
 that on sight
 lawfully
 at

case your Lordships to grant war-
 ers of caption in the premises, in com-
 form. ACCORDING TO JUSTICE.
 E F's (i. e. a Writer to the Signet's) bill.

This bill, with the registered letters of horning, is pro-
 duced to the clerk to the bills, who marks the date, and
 adds "fiat ut petitur, because the Lords have seen the re-
 gistered horning," and signs it, and this becomes the
 warrant for letters of caption, on which the tenant may
 be imprisoned.

Letters of Caption.

GEORGE THE FOURTH, by the grace of God, of the
 united kingdom of Great Britain and Ireland, King,
 Defender of the Faith, To
 messengers at arms, our sheriffs in that part, jointly and
 severally, specially constituted, greeting, WHEREAS it
 is humbly meant and shewn to us, by OUR LOVING, A B,
 That upon the day of , C D was duly

answer to us thereupon; WHICH to do, we commit to you, and each of you, full power, by these our letters, delivering them, by you duly executed and indorsed again to the bearer; GIVEN under our signet, AT EDINBURGH, the day of , in the year of our reign, 18 .

PER DECRETUM DOMINORUM CONCILII.

Signed by a Writer to the Signet.

(when the letters pass on a bill, in place of PER DECRETUM, say, EX DELIBERATIONE DOMINORUM CONCILII, &c.)

The letters of horning, after being signed by a writer to the signet, are produced with the extracted tack, as their warrant, or with the bill, at the Signet Office, and are there signeted. They then become a warrant, on which the tenant may be charged to pay the rent, &c. and whatever may be the conditions come under by him, these will be narrated in the letters of horning, and performance may, in like manner, be enforced by a charge given by the messenger. The days of charge (that is, the six days, within which the tenant is ordered to obey) being expired, the effects of the tenant may be poinded, or he may be denounced rebel, and the letters recorded, which, with the forms to be noticed afterwards, will authorise letters of caption to pass against him. But here it must be attended to, that poinding can take place only where the tenant is charged to pay a precise sum, but cannot be resorted to for enforcing performance of an act.

Taking, then, the case where the letters are to be enforced by imprisonment, and on the supposition that the tenant has been denounced rebel, and the letters and executions recorded, a bill is prepared in the following terms:

Bill for Letters of Caption.

My Lords of Council and Session, unto your Lordships, humbly means and shews your servitor A B,
That upon the day of , C D was duly

and orderly denounced rebel, and put to the horn, by virtue of letters of horning, raised and executed at my instance, against him, for not making payment to me of the sum of £ Sterling, (*or he may have been charged to perform certain obligations, and in that case they will be stated in the terms of the execution*), together with the sum of £ of penalty, incurred through failure, all contained in, and due by a tack, of date , entered into betwixt C D and me, on the one and other parts, which tack is duly registered in your Lordships' books, and having a decree of your Lordships interponed thereto, (*if the tack have been recorded in inferior court books, say, "which tack is duly registered in the " Sheriff-court books of E, and has the precept of the " said Sheriff in the end thereof,"*) in manner more fully mentioned in the said letters of horning, as the same, with the executions thereof, duly registered here to shew, will testify.

May it therefore please your Lordships to grant warrant for letters of caption in the premises, in common form. ACCORDING TO JUSTICE.

E F's (*i. e.* a Writer to the Signet's) bill.

This bill, with the registered letters of horning, is produced to the clerk to the bills, who marks the date, and adds "*fiat ut petitur, because the Lords have seen the registered horning,*" and signs it, and this becomes the warrant for letters of caption, on which the tenant may be imprisoned.

Letters of Caption.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us, by OUR LOVITE, A B, That upon the day of , C D was duly

, as the said lease, of date foresaid recorded , more fully bears: THAT although it was incumbent on the said B, in terms of the said lease, and from the obligation he lies under as tenant in the said lands, to have entered thereto at the said term of , and to have fully stocked and plenished the same, and to have laboured the farm in a proper and husband like manner; yet he hath hitherto neglected so to do; AND THEREFORE, (1.) the said B OUGHT and SHOULD be DECERNED and ORDAINED, by DECREE of the LORDS of our COUNCIL and SESSION, instantly to enter into possession of the said farm, and to stock and plenish the same in a sufficient and proper manner; AS ALSO, during the currency of the said lease, to labour and manure the said lands, according to the rules of good husbandry. *(if there be any plan of management contained in the lease, it will be stated above. and repeated here, as the rule for the tenant, beginning thus, "and in particular," as specified in the said tack, to, &c.)* and to perform the whole conditions of the said lease, to which, by becoming a party thereto, he has subjected himself; AND FURTHER, the said B OUGHT and SHOULD be DECERNED and ORDAINED, by DECREE foresaid, to make payment to the pursuer of the sum of £100 Sterling or of such other sum as our said Lords shall modify as the expenses of process to follow hereon. besides the expense of extracting the decree to be pronounced therein, after the form and tenor of the said tack. and laws and daily practice of Scotland used and observed in the like cases in all points, as is alleged. *(Or, the conclusion may be, that the tenant shall be found liable in damages. and the lease declared to be at an end; in that case, in place of what follows figure 1.) the conclusions may be in these terms,* AND THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by DECREE of the LORDS of our COUNCIL and SESSION, that unless the said B shall, on or before the day of , enter into possession of the

over to us thereupon; which to do, we commit to you, and each of you, full power, by these our letters. delivering them by you, duly executed and indorsed again to the bearer; GIVEN under our signet, at Edinburgh, the day of , in the year of our reign 18 .

EX DELIBERATIONE DOMINORUM CONCILII.

Signed by a Writer to the Signet.

These letters being signed and signeted, become a warrant to the messenger to imprison the tenant.

There is this difference betwixt the diligence following on a decree of registration, and that which follows on a decree pronounced by the Court of Session in an action in which there has been appearance made for both parties, that although the former may be suspended, the latter does not admit of any sist, though under certain circumstances, unnecessary to be here taken notice of, it is subject to reduction. The diligence, of which we have been giving examples, then, admits of suspension, in which, on the tenant's finding caution, he may be allowed to plead his defences, consisting in payments or counter-claims, of whatever kind they may be.

II. SUMMONS AGAINST THE TENANT, FOR NOT POSSESSING, STOCKING, AND LABOURING THE FARM.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To

messenger at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us by our LOVITE A, That by tack, of date , entered into betwixt the pursuer and B, he set to the said B and his heirs, &c. all and whole the lands, &c. and that for the space of 19 years from and after his entry thereto, which is thereby declared to commence at the term of

power, by these our letters, delivering them by you, duly executed and indorsed again to the bearer. Given under our signet, at Edinburgh, the day of , in the , year of our reign 18 .

Subscribed by a Writer to the Signet.

The first of these conclusions may be taken where the landlord is desirous that the tenant shall possess the farm. The decree which will be pronounced may be enforced by imprisonment, though the necessity of such a measure can scarcely be supposed. If, on the other hand, the landlord be desirous that the tenant shall not enter into possession, the other conclusions will better answer his views.

III. ACTIONS FOR PRESERVING WOOD AND PLANTING.

The action in this case may proceed either on the act of Parliament, or on the terms of the lease.

Summons on the Act 1698, c. 16.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us by OUR LOVITE A, heritable proprietor of the lands of , THAT by the 16th act of the 7th Session of the first Parliament of King William, it is statuted and ordained, "That all tenants and cottars shall preserve and secure all growing wood and planting that is upon the ground they possess; that none of it shall be cut, broke, or pulled up by the roots, or the bark peeled off any tree; and that under the pain, to be exacted by their masters allenary, of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree that is above the said age of ten years." And it

is further ordained, that the tenant shall "be liable for
 " his wife, children, and servants, or any others within
 " his family that shall contravene the said act." AND
 THAT B, the tenant in the said lands, has since his entry
 thereto, by himself, his wife, children, servants, or others
 in his family, his dependants, or of his causing, cut, broke,
 or pulled up by the roots, or peeled the bark off trees
 growing on the said lands; of which are more than
 ten years old: AT LEAST, trees to that number and
 of that age have, within the space foresaid, been cut,
 broken, or pulled up by the roots, or had their bark
 peeled off; and which trees the said B was, in terms of
 the said statute, bound to have preserved and secured
 from such damage. THEREFORE, the said B, OUGHT and
 SHOULD be DECERNED and ORDAINED, by DECREE of the
 LORDS of our COUNCIL and SESSION, to make payment
 to the pursuer of the sum of twenty pounds Scots, for
 each of the said trees above the age of ten years, and of
 ten pounds Scots for each tree under that age: AND
 FURTHER, the said B OUGHT and SHOULD be DECERNED
 and ORDAINED, by the decree foresaid, to make pay-
 ment to the pursuer of the sum of fifty pounds Sterling,
 or such other sum as the said Lords shall modify as the
 expense of the process to follow hereon; besides the
 expense of the decree to be pronounced therein, after the
 form and tenor of the statute libelled on, and laws and
 daily practice of Scotland, used and observed in the
 like cases in all points, as is alleged.

OUR WILL IS HEREOF, &c. *in common form.*

This form will answer for the summons before an in-
 ferior Judge, the changes on the mere words of style be-
 ing unnecessary to be noticed.

*Summons of Damages for Acts of Trespass by Cattle, and
 for Trees cut and destroyed.*

GEORGE THE FOURTH, by the grace of God, of the
 united kingdom of Great Britain and Ireland, King,

Defender of the Faith, To messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us, by our LOVITE A, THAT WHEREAS the planting and inclosing of ground in this our kingdom of Scotland tends to promote the interest and advantage, not only of the proprietors of those grounds in particular, but also is of real utility and benefit to the country in general, which renders it proper that the destroyers of planting and inclosures be fined and punished according to law: AND WHEREAS, by the laws and practice of this realm, the destroyers of planting and inclosures are subject and liable in damages and expenses to the proprietors and possessors of the grounds so planted and inclosed; and particularly, by the act of Parliament passed in the year 1685, c. 39, it is statuted and ordained, " That no person shall cut, " break, or pull up any tree, or peel the bark off any " tree, under the pain of £10 Scots for each tree " within ten years old, and £20 Scots for each tree that " is above the said age of ten years; and that the havers " or users of the timber of any tree that shall be so cut, " broken, or pulled up, shall be liable to the same penalty, except he can produce the person from whom he " got it; and that no person shall break down or fill " up any ditch, hedge, or dike whereby ground is inclosed, and shall not leap, or suffer their horse, nolt, " or sheep, to go over any ditch, hedge, or stile, under " the pain of £10 Scots, *toties quoties*;" in manner more fully expressed in the said act of Parliament, as the same, and others on the same subject, hereby referred to, at more length bear: AND WHEREAS C, tenant in , has damaged and destroyed a great number of young trees belonging to the pursuer, on his lands of , in the parish of ; and that the said C has also greatly damaged and destroyed the inclosures, ditches, and hedges, made by the pursuer on his said lands, by

allowing horse, nolt, and sheep belonging to him to leap over the said fences, and enter into the said inclosures, eating and destroying the said trees at different times, during the course of the three last years bypast, whereby the pursuer has suffered great damage: AND ALTHOUGH the pursuer has often desired and required the said C to make payment to him of the damage he has sustained in manner foresaid, and to desist and cease from the like acts, yet he delays so to do: THEREFORE, the said C OUGHT and SHOULD be DECERNED and ORDAINED, by DECREE of the LORDS of our COUNCIL and SESSION, to make payment to the pursuer of the sum of Sterling, or of such other sum as the said Lords shall modify, as a full and adequate compensation and solatium to the pursuer, for the damage and injury sustained by him, from the foresaid illegal acts of the said C in manner foresaid, with interest of the said sum from the date of the citation to be given hereon during the not payment thereof: AND THAT over and above such other sum as our said Lords shall modify, in name of fine and penalty, for the C's trespassing against the said act of Parliament, as therein more particularly expressed.* AND FURTHER, the said C OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to make payment to the pursuer of the sum of one hundred pounds Sterling, or such other sum as our said Lords shall modify as the expense of process to follow hereon, besides the expense of extracting the decree to be pronounced therein, conform to the said statute, and laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOF, &c.

Or the action may be in this form :

GEORGE, &c. OUR LOVITE A, That, by Act of Par-

* Can this fine be concluded for without the concurrence of the Public Prosecutor ?

liament passed in the year 1685, c. 39, it is enacted, statuted, and ordained, (*here the act will be stated, as in the preceding example*); And whereas C, residing in , has cut down trees, less or more, growing on the lands of , belonging to the pursuer, and lying in the parish of ; and which trees the said C sold to D, whereby the said C and D are, in terms of the said act, jointly and severally liable to the pursuer in the sum of twenty pounds Scots for each tree so cut down. THEREFORE, the said C and D OUGHT and SHOULD be DECERNED and ORDAINED, by DECREE of our LORDS of COUNCIL and Session, to make payment, conjunctly and severally, to the pursuer, of the sum of twenty pounds Scots for each of the said trees so cut down, as the same shall be ascertained in the course of the process to follow hereon; agreeable to the enactments of the said statute: AND FURTHER, the said C and D OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to make payment, jointly and severally, of the sum of £50 Sterling, or such other sum as our said Lords shall modify, as the expense of the process to follow hereon, besides the expense of extracting the decree to be pronounced therein, after the form and tenor of the said statute, and laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOFRE, &c.

Having formerly quoted the act 1698, c. 16,* which relates to the question between landlord and tenant, where trees or planting are destroyed on a farm in the possession of the tenant, I shall add here the act on which these other actions are founded.

* *Supra*, p. 266.

Act in favours of Planters and Inclosers of Grounds,
1685, c. 39.

Our Sovereign Lord, with the advice and consent of the Estates of this present Parliament, for the encouragement of inclosing the ground, and planters of trees, does ratify and approve all former laws and acts of Parliament made in favour of inclosers of ground and planters of trees; and particularly the 41st act, Parl. 1. Charles II. entitled, "Act for planting and inclosing of ground;" and because the time prescribed in the said act is now elapsed, they statute and ordain, That the whole heads contained in the said act be observed for the space of nineteen years next to come, commencing from the date hereof: and likewise ratifies and approves the 17th act Parl. 2, Charles II. entitled, "Act for inclosing of ground," and ordains the same to be observed in all time coming. And farther statutes and ordains, that hereafter no person shall cut, break, or pull up any tree, or peel the bark off any tree, under the pain of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree that is above the said age of ten years: and that the havers or users of the timber of any tree that shall be so cut, broken, or pulled up, shall be liable to the same penalty, except he can produce the person from whom he got it; and if the person that shall be so convicted be not able to pay the fine, then he shall be decerned to work a day for each half merk contained in the said fine, to the heritor whose planting shall be so cut or broken. As likewise, statutes and ordains, That no person shall break down, or fill up any ditch, hedge, or dyke, whereby ground is inclosed, and shall not leap, or suffer their horse, nolt, or sheep, to go over any ditch, hedge, or dyke, under the pain of ten pounds Scots, *toties quoties*; the half whereof to be applied to the heritor, and the other half for the mending and repairing of bridges and highways within the parish, at the sight of the sheriff, steward, or justice of peace, before whom the contraveners shall be pursued.

IV. DECLARATORS OF IRRITANCY.

*Declarator of Irritancy on account of the Tenant's having
Subset his Farm.*

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To

messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us by our LOVITE A, heritable proprietor of the lands after-mentioned, THAT, by tack entered into betwixt the pursuer, on the one part, and B on the other, the pursuer set to him and his heirs, but expressly excluding assignees and sub-tenants, all and whole the lands of , with the pertinents lying within the parish of , and sheriffdom of , and that for the space of nineteen years from the term of by which lease it is expressly declared, that if the said B shall grant either an assignation or sub-lease of the said farm, he shall, *ipso facto*, forfeit the lease, without the necessity of a declarator of nullity to follow thereon; and that it shall thenceforth be lawful to the pursuer to enter immediately into the possession of the said farm, and to use and dispose thereof at pleasure, as the said tack, of date , recorded , in itself more fully bears: AND WHEREAS the said B, in direct opposition of the said condition, has given up the possession of the said farm, and placed a sub-tenant therein, whereby he has incurred the said irritancy: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by DECREE of the LORDS of our COUNCIL and SESSION, that the said B has subset the said farm, and thereby incurred the irritancy in the said tack: AND the same being so FOUND and DECLARED, it OUGHT and SHOULD be further FOUND and DECLARED, by decree foresaid, that the said B has

forfeited all right and title to the said tack, and to the possession of the land thereby set; and that the said tack, in so far as he, or those deriving right from him, is concerned, is extinct, void, and null in all time coming, as if the same had never been made or granted: And the said B OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to flit and remove himself, his family, cottars, sub-tenants, goods, and gear, from the said lands against the term of next, to the effect the pursuer, or others in his name, may enter thereto, and labour, possess, and dispose of the same at pleasure. AND the said B OUGHT and SHOULD be further DECERNED and ORDAINED to make payment to the pursuer of £50 Sterling, or such sum as our said Lords shall modify as the expense of the process to follow hereon, besides the expense of extracting the decree to be pronounced therein, after the form and tenor of the writing libelled on, and laws and daily practice of Scotland, used and observed in the like cases in all points.

OUR WILL IS HEREOFRE, &c.

Declarator of Irritancy for not-payment of the Tack-duty, proceeding on an Irritant Clause in the Lease.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To

messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us, by our LOVITE A, heritable proprietor of the lands after-mentioned, That, by tack entered into betwixt the pursuer, on the one part, and B, on the other, he set to the said B, and his heirs and successors, all and whole the lands of , with the pertinents lying within the parish of , and sheriffdom of , during the space of nineteen years, from and after the

term of _____, which was declared to be the term of the said B's entry to the possession of the said lands: That the said B, on the other part, bound and obliged himself, his heirs, executors, and successors, to make payment to the pursuer, and his heirs or assignees whomsoever, of the yearly rent of £50 Sterling, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the term of Martinmas then next, for the half year immediately preceding, and so forth, yearly, termly, and proportionally, in all time thereafter, during the currency of the said tack; with a fifth part more of each term's payment, in name of liquidate penalty, in case of failure, and the legal interest of the said termly payments, from the time the same should fall due, and during the not payment thereof. AND it is by the said tack expressly provided and declared, That, in case two terms tack-duty shall remain unpaid until a third becomes due, then and in that case the said tack shall from thenceforth, *ipso facto*, become void and null, without the necessity of any declarator of irritancy; and that it shall be in the power of the pursuer, or his foressaid, instantly to enter, immediately, to the peaceable possession of the said lands and pertinents, and to use and dispose thereof at pleasure, as the said tack, dated _____

_____, and recorded _____, more fully bears. AND WHEREAS, the said B has not only suffered two terms rent to remain unpaid until a third is due, but is owing the tack-duty from the term of _____ to the term of _____ last, whereby the said irritancy has been incurred, and the tack has become void and null: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by DECREE of the LORDS of our COUNCIL and Session, That the foressaid tack-duty is resting owing for the terms foressaid, and that thereby the said B has incurred the irritancy stipulated in the said tack; AND the same being so found and declared, it OUGHT and SHOULD be

further FOUND and DECLARED, by decree foressaid, that the said B has forfeited all right and title to the said tack, and to the lands thereby set; and that the said tack (in so far as the said B has any interest therein) is extinct, void, and null in all time coming, as if it had never been made or granted; AND the said B OUGHT and SHOULD be DECERNED and ORDAINED, by decree foressaid, to make payment to the pursuer of the sum of , as the tack-duty due by him for the crops and years above specified, with the legal interest thereof, from the respective terms when the same fell due, and in time coming during the not payment, with £ Sterling of liquidate penalty incurred through failure, AND to FLIT and REMOVE himself, his family, cottars, goods, and gear from the said lands against the term of next, to the effect the pursuer, or others in his name, may enter thereto, and labour, occupy, possess, use, and dispose of the same at pleasure; AND the said B OUGHT and SHOULD be further DECERNED and ORDAINED, to make payment to the pursuer of the sum of £ , as the expense of this process, and of extracting the decree to follow hereon, in terms of the tack above narrated and laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOFRE, &c.

Connected with this is the action authorised by the Act of Sederunt 14th December 1756, by which an irritancy may be declared where the tenant has run two years in arrear.

Declarator of Irritancy before the Judge Ordinary, on the Act of Sederunt 1756.

A B, Esq. his Majesty's Sheriff-depute for the shire of , To Officers of Court, &c. WHEREAS it is shewn to me by A, heritable proprietor of the

lands after-mentioned, THAT, by tack entered into betwixt the complainer on the one part; and B on the other, he set to the said B, and his heirs and successors, all and whole the lands of , lying within the parish of , and shire of , and that for the space of nineteen years, from and after the term of , which is thereby declared to be the term of his entry to the said farm. That the said B, on the other part, bound and obliged himself, his heirs, executors, and successors, to make payment to the complainer, his heirs and assignees whomsoever, of the yearly rent of £50 Sterling, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the term of Martinmas then next, for the half year immediately preceding, and so forth, yearly, termly, and proportionally, in all time thereafter, during the currency of the said tack, with a fifth part more of each term's payment, in name of liquidate penalty, in case of failure, and the legal interest of the said termly payments, from the time the same fell due, and during the not payment thereof, as the said lease, dated , and registered , in itself more fully bears: THAT by the Act of Sederant of the Lords of Council and Session, dated the 14th day of December 1756, it is, *inter alia*, declared, " That, " where a tenant hath irritated his tack, by suffering " two years rent to be in arrear, it shall be lawful to " the setter or heritor to declare the irritancy before " the Judge Ordinary, and to insist in a summar re- " moving before him; and it shall be lawful to the " Sheriff, or Stewart-depute, or their Substitutes, to " find the irritancy incurred, and to decern in the re- " moving, any practice to the contrary notwithstanding." AND WHEREAS the said B is resting and owing to the complainer the sum of one hundred pounds Sterling, as two years' tack-duty of the said lands, at and

preceding Whitsunday last, which he refuses to pay; whereby, in terms of the said Act of Sederunt, he has irritated the said tack: THEREFORE, it OUGHT to be FOUND and DECLARED, by my sentence and decree, That he, the said B, defender, has irritated his said tack, by suffering two years' rents to be in arrear; and which being so found and declared, it OUGHT and SHOULD be farther FOUND and DECLARED, that the said B has forfeited all right and title to the said tack, and to the possession of the lands thereby set; and that the said tack (in so far as the said B has any interest therein) is extinct, void, and null, in all time coming, as if it had never been made: AND the said B SHOULD be DECERNED and ORDAINED to make payment to the complainer of the said sum of £100 Sterling, as the tack-duty due by him for the crops and years above specified, with the legal interest thereof from the respective terms when the same fell due, and in time coming, during the not payment, with a fifth part more of penalty incurred through failure: AND ALSO to FLIT and REMOVE himself, his family, cottars, goods, and gear, from the said lands against the term of next, to the effect the complainer, or others in his name, may enter thereto, and peaceably possess and enjoy the same at pleasure. AND he OUGHT further to be DECERNED and ORDAINED to make payment to the complainer of the sum of five pounds, or such sum as shall be modified, in name of damages, and as the expense of the process to follow hereon, besides the expense of extracting the decree to be pronounced therein, conform to the laws and daily practice, used and observed in the like cases, as is alleged. . Therefore, &c.

V. FORMS OF PROCEDURE RELATIVE TO THE HYPOTHEC.

Formerly, when a poinding had the effect of carrying off the property of a tenant, and where there were no means of defeating the preference which was obtained by that diligence, it was freely resorted to, and it held

out an encouragement to the creditor of the tenant to pursue that method of recovering his debt in preference to any other. But the influence of the bankrupt statutes, and the salutary regulations which they have introduced, while they enable other creditors to defeat the preferences which pouncing formerly bestowed, have also put the disposal of the property under the control of the Sheriff, and the effect of this has been, to give an important turn to the course of legal diligence.

A creditor who has no preference to expect from a pouncing, and no advantage to derive by selling the pounced goods, and accounting only for the appreciated value, will resort rather to the aid of personal diligence, and the caption will bring the resources of the debtor into activity, more effectually than even the pouncing.

The pouncing will therefore be less frequently resorted to; and when it is used, the landlord will find it more advisable to claim his right before the Sheriff (by whom the order of sale in the pouncing is to be given), than to appear on the ground, and obstruct the proceedings of the messenger.

The protests at the instance of pouncing creditors, their actions in consequence of their diligence being obstructed, or the actions against these creditors at the instance of the landlords, will, from the circumstances which I have mentioned, in a great measure disappear from practice; at the same time, some of these forms are given, in case they should be required.

With this view I may observe, that the relief competent to the creditor of the tenant arises from his offering caution to the landlord for payment of the rent, or, where it is payable in grain, for delivery of the grain in terms of the obligations in the lease; and the mode of transacting this, is either by privately satisfying the landlord on the subject, or (should he start any difficulty) by offering the security under the form of instrument, by which means evidence of the offer will be

preserved, which will form the ground on which the creditor's action of damages must depend.

Instrument of protest against a Landlord.

At _____, and within the manor-place thereof, the day of _____ 18____ years, IN PRESENCE OF me, notary-public, and of the witnesses after-designed, and hereto subscribing, COMPEARED L, as attorney for M, and passed with us to the presence of A, heritable proprietor of the lands of _____ set to B, at least landlord to the said B, in the said lands, the said attorney HAVING AND HOLDING in his hands letters of horning and poinding, of date _____, obtained at the instance of the said M, against the said B, for payment to him of (*here state the nature and extent of the debt*), with the executions of the said letters, bearing date _____; which diligence and executions the said L delivered to me the said notary-public, to be read to the said A, and witnesses present, which accordingly I did; AND THEREAFTER the said L, as attorney foresaid, represented to the said A, that as the days of the charge given on the said letters had expired, without payment having been made by the said B, of the debt charged for, a poinding of his effects was immediately to take place; and in order to secure the said A in payment of the rent to the full extent of his claim of hypothec, He made offer of a bond of caution granted by the said M and N, whereby they became bound, jointly and severally, to make payment to the said A, his heirs and assignees, of the sum of £_____, as the rent of the said lands for the current year, and that at the term of _____, with a fifth part more of the said sum of liquidate penalty, in case of failure, and the legal interest thereof from the term of _____, and yearly and termly thereafter during the not payment thereof: WHICH BOND OF CAUTION the said

I. delivered to me to be read to the said A, and the witnesses foresaid, and which was accordingly done; AND the said A having DECLINED to accept of the said bond of caution, or to consent to allow the pointing to proceed, the said L, as procurator foresaid, PROTESTED, that, in case the messenger should be deforced in the said pointing, or the same in any way obstructed by the said A, or any in his name, or by his connivance, he and they should be liable, jointly and severally, to the said M, in payment of the said debt contained in the said diligence, principal, interest, and expenses, as well as for the expense and damage to which the said B may be thereby exposed. WHEREUPON, and upon all and sundry the premises, the said L took instruments in my hand; THESE THINGS were so done, place and date foresaid, in presence of O and P, witnesses to the premises, specially called and required.

R——N. P.

O, witness.

P, witness.

Bond of Caution offered to the Landlord.

I, M, CONSIDERING that, in virtue of letters of horning and pointing, dated and signeted _____, I proposed to point the corns and other effects of B, tenant in the lands of _____, for payment of the sums of money contained in the said letters of horning; and it being reasonable that A, the landlord of the said B, should be secured in payment of the current year's rent of the said lands, for which he has a right of hypothec over the crop and stocking on the lands: Therefore I, the said M, as principal, and I, N, cautioner, with and for the said M, bind and oblige ourselves, conjunctly and severally, our heirs, executors, and successors, to make payment to the said A, landlord to the said B, of the sum of £ _____, being the rent of the said lands

for the current year, and that at the terms following, viz. (*here mention them as in the lease*), with a fifth part more of the said principal sum of liquidate penalty, in case of failure, and the legal interest thereof from the said term of , and yearly and termly thereafter during the not payment. AND I, the said M, hereby BIND and OBLIGE myself, my heirs, executors, and successors, to free and relieve, harmless and skaithless keep the said N and his foresaids, from payment of the said sums, principal, interest, and penalty, or any part thereof, and of all damage and expense he may sustain through his becoming bound in manner herein expressed; AND WE CONSENT to the REGISTRATION hereof in the books of Council and Session, or others competent, that letters of horning on six days charge, and all other execution necessary, may pass on a decree to be interponed hereto, in common form; and for that purpose CONSTITUTE

our procurators, &c. IN WITNESS WHEREOF, &c.

Where any part of the rent is payable in victual, an obligation to deliver the victual of the current year at the terms, and under the penalty expressed in the lease, must be added to the obligation; the terms of the lease will regulate this part of the obligation.

Schedule of Poinding of the Crop of a Tenant.

I, W G, MESSENGER at ARMS, by virtue of letters of horning, containing warrant to poind, dated and signetted , raised at the instance of M against B, present tenant in , and of an execution of charge thereon, by messenger at arms, bearing him to have passed upon the and to have lawfully commanded and char-

ged the said B to make payment to the said M of the sum of £ Sterling of principal, and of the interest thereof, with £ Sterling of penalty incurred through failure, all contained in a bond and obligation, bearing date , granted by the said B and by G, upon the narrative that the said M had agreed to allow the said B a credit upon a cash account, to be kept in their books in name of the said B, to the extent of £ Sterling, with a fifth part more of liquidate expense in case of failure; which bond is registered in the books of Council and Session , and conform to a stated account, made out and subscribed in manner mentioned in said bond, as is all more particularly expressed in the said letters of horning and executions thereof; FIRST with the notary-public, appraisers, and witnesses, after mentioned, to the lands and farm of , at present possessed by the said B, AND THERE, after crying three several oyesses, open proclamation, and by publicly reading the said letters of horning and execution of charge; IN his MAJESTY'S NAME and AUTHORITY, I lawfully APPREHENDED and POINDED the wheat, barley, oats, peas, and beans, growing upon the several parts after expressed of the said lands; and for appreciating and valuing the said victual, I adduced and appointed R S and J D, licensed appraisers, who, after swearing the oath *de fidei*, &c., appreciated and valued the same to the particular values and prices after mentioned; viz. The wheat on the easter park at per boll, fodder included: Item, oats in the said park at per boll, with the fodder, &c. &c., and that as the same should amount to when cut down, cast to the proof, threshed and dighted; AND I delivered repps and samples of the said several kinds of victual growing in the said lands to G, as procurator for the said M, who thereupon asked and took instruments in the hands of J M, notary-public. All

these things were so done on the ground of the said lands
on day of , before these witnesses, W R
and R A.

W G, messenger.

G, attorney.

J M, N P.

W R, witness.

R A, witness.

The messenger's execution corresponds with this schedule, and it is unnecessary to repeat a form varying so little from the schedule, and which is sufficiently known to the messenger.

Summons at the instance of the Landlord against a Creditor of the Tenants, by whom the Effects have been carried off.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To

messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting,
WHEREAS it is humbly meant and shewn to us by our LOVITE A, That by tack, dated , the pursuer set to B the lands of , for the space of , at the yearly tack-duty of £ Sterling, payable at the terms, &c. with a fifth part more of penalty, in case of failure, and bearing interest from the respective terms of payment during the not payment thereof: THAT, in virtue of the said tack, the said B entered into possession of the said farm; and that he is not only due the current year's rent, amounting to the sum of £ Sterling, payable at the terms of , but is also due a considerable arrear of rent; AND WHEREAS, D and E having intromitted with, used and disposed of as much of the crop of the present year which grew on the said farm possessed by B, and of the stocking

which pastured thereon for that period, as is worth the sum of £ Sterling; they are liable to the pursuer, jointly and severally, for the said current year's rent: THEREFORE, the said D and E OUGHT and SHOULD be DECERNED and ORDAINED, by decree of the LORDS of our COUNCIL and SESSION, jointly and severally, to make payment to the pursuer of the said sum of £ Sterling, being the current rent for which the pursuer's right of hypothec over the said crop and stocking intromitted with by them extends, with interest thereof from the terms of , and in time coming during the not payment thereof: AND FURTHER, they OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to make payment to the pursuer of the sum of £50 Sterling, or such other sum as the said Lords shall modify as the expense of the process to follow hereon, besides the expense of extracting the decree to be pronounced therein, after the form and tenor of the writs libelled on, and laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOF, &c.

Where the goods of a tenant have been poinded, they are not now removed as was formerly the custom, but the execution of poinding is reported to the Sheriff, who gives a warrant for rousing the goods to the extent of the debt and expenses. The proper form of proceeding on the landlord's part, therefore, is to present a petition to the Sheriff, stating the nature and extent of his claim of hypothec; and where the poinding has taken place before the term of payment, to crave that the rent shall be consigned, or caution found by the poinding creditor for the current year's rent, before the sale be allowed; or where it has taken place after the term, either that payment shall be made to him of the current rent, or that grain to the value of that rent shall be left untouched.

Summons at the instance of the Creditor of a Tenant, whose Diligence has been interrupted by the Landlord.

GEORGE, &c. OUR LOVITE M, That he, by a bill dated , drawn by him upon, and accepted by B, ordered him, after date, to have paid to the drawer, or order, the sum of £ for value; which bill was duly protested for not payment, and the instrument of protest, taken thereon, registered in the books of our Council and Session, and a decree of the Lords thereof interponed thereto on the , on which the pursuer raised letters of horning and poinding against the said M, which are dated and signeted : That in virtue thereof , messenger at arms, did, upon the day of , pass to the ground of (*here detail the facts as stated in the execution of de-forcement, returned by the messenger*): THAT by thus deforcing the said messenger in the regular execution of his duty, under an alleged title as landlord to B, and proprietor of the said lands, the said A has subjected himself in payment of the said debt due to the pursuer, and in damages: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by DECREE of the LORDS of our COUNCIL and SESSION, that the said A did, in an irregular and illegal manner, interpose and obstruct the legal diligence of the pursuer; and the same being so found, the said A OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to make payment to the pursuer of the foresaid principal sum of £ Sterling, and interest thereof since the same fell due, and in time coming until payment: TOGETHER with the sum of £10 Sterling, or such sum, less or more, as our said Lords shall modify in name of damages, and as the expense of the proceedings which the interference of the said A rendered useless; AS ALSO of the sum of £50 Sterling, or such sum as the said

Lords shall modify as the expense of the process to follow hereon, besides the expense of extracting the decree to be pronounced therein, after the form and tenor of the letters of homing and execution of poinding, and laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOFRE, &c.

These forms will very seldom be resorted to, as the application to the Sheriff, where a poinding is attempted, will supply their place: I therefore proceed, in the next place, to the form of the application for a sequestration.

Petition for the Sequestration of a Tenant's Effects.

Unto the Honburable the sheriff of E,

The Petition of A, _____

Humbly Sheweth,

That by tack entered into between the petitioner and B on the one and other parts, bearing date _____, the petitioner set to the said B ALL AND WHOLE, &c. and that for the space of nineteen years, commencing _____; For which causes the said B thereby bound and obliged himself to pay to the petitioner the sum of £ _____ Sterling, in name of tack-duty, for the first crop and year _____ for the houses and parks of _____, with six *per cent.* for the sum to be expended by the petitioner, in repairing the said house and offices, to be paid with the rent yearly, after the repairs were made; and that at two terms in the year, Whitsunday and Lammas, by equal portions, beginning the first term's payment at Whitsunday _____, and the next at Lammas thereafter, for crop _____, and so forth thereafter, with £ _____ Sterling for each term's failure; as an extract of the said tack, containing several other clauses, registered in the books of Session _____, bears.

That the said B is indebted to the petitioner in the sum of £ Sterling, as the rent due for his possession, crop and year , which was payable at Whitsunday and Lammas : The like sum of £ for crop and year , of which one half was due at Whitsunday last, and the remainder will be payable at Lammas next, besides the termly failures incurred, and the current year's rent, which will be payable at Whitsunday and Lammas : and farther, the petitioner having expended £ in repairs on the said houses and fences, as acknowledged by the said B in a renunciation of his tack herewith produced, he, the said B, is due the *per centage* thereof, which being payable along with the said rent, was declared to be a rent by the said tack; and at Whitsunday and Lammas , he ought to have paid the first year's rent, being £ , alongst with the rent for crop and year , and he ought to have paid £ Sterling at Whitsunday last, all which is still resting and owing by the petitioner.

That the petitioner has by law a right of hypothec for the foresaid year's rent, crop , payable at Whitsunday last, and Lammas next, as well as for the rent and interest that will be due for the present crop and year ; and seeing the crop and stocking on the said lands is liable to be embezzled and abstracted to the prejudice of the petitioner's right of hypothec unless a remedy be applied.

MAY IT THEREFORE please your Lordship to grant warrant to your clerks of court, or their servant, to repair to the said houses and farms of , and there to INVENTORY and SEQUESTERATE the whole corn, cattle, household furniture, and other effects found thereon, in security to the petitioner of the rent, crop , and of the current crop, with the termly failures incurred; AND thereafter to ROUN up as much thereof as will satisfy and pay the foresaid rents and penalties already due; together

with the expense of sequestration and roup, and the remainder to remain under sequestration till further orders. (*Or application may be made for rousing to the extent of the different terms' rents, the bills being made payable at the respective terms of payment of these rents.*)

ACCORDING TO JUSTICE, &c.

This is signed by a Solicitor before the Sheriff-court.

Deliverance by the Sheriff.

(Date). The Sheriff having considered this petition, with the writs produced therewith, grants warrant to the clerk of court, or his servant, to repair to the houses and farm of , and there to make inventory of, and sequestrate the cattle, household furniture, and other effects that shall be found thereon, for security and payment to the petitioner of the rent mentioned in the petition, for crop and year , and expenses; and also to make inventory of, and sequestrate the whole corns, cattle, and other effects on the said grounds, for security and payment to the petitioner of the rents mentioned in the petition, for the current year's crop and expenses. Allows the within-designed B to see and answer the petition, with respect to the conclusion, for rousing the said sequestrated effects, and appoints him to be summoned and served with a copy of the petition and this interlocutor.

Signed by the Sheriff.

Charge by the Officer, subjoined to the copy of the Petition and Deliverance.

I, Sheriff-officer, SUMMON you, the above named and designed B, to compare before the Sheriff of E—, on the of , in the hour of cause, To ANSWER at the instance of A ; that is to say,

to hear and see warrant of roup granted, &c. This I do, on the _____, before these witnesses, J S and W R.

Signed by the Officer.

At the same time of intimating the petition to the tenant, the goods are inventoried in this form:—

Inventory of the cattle, household furniture, and other effects in the house, garden, and parks, of _____, and also, upon the farm of _____, both lying &c., possessed by B, tacksman of the said subjects, sequestrated in virtue of the Sheriff-substitute of the county of E, his warrant of sequestration dated the _____, obtained at the instance of A, for security and payment to him of £ _____, as the rent of said subject, crop, and year _____, payable at Whitsunday and Lammas _____, by equal portions, and £ _____ as the year's interest of £ _____ Sterling, bestowed by the said A on the houses and fences of _____, and payable by the said B at Whitsunday and Lammas _____, by equal portions, and expenses in the premises; as also, inventory of the whole corn on the said subjects, sequestrated for security and payment to the said A, of £ _____ and £ _____, as the rent of the current crop and year _____, payable at Whitsunday and Lammas _____, by equal portions, with the expenses.

In the House.

Blue Room. A chinzt bed, feather-bed, bolster and pillows, three pair of blankets, a carpet, two arm-chairs, two pair of dornick curtains, a scrutoire, a looking-glass, a picture with a gilded frame, and a chamber chimney.

In the same way the furniture in the other rooms of the house will be specified.

Cattle. Two horses, two mares, eight milch cows, eleven stirks, from one to three years old.

Labouring implements. Two close bodied carts, mounted on wheels, two open carts unmounted, a stand of fanners, two ploughs with their graith, four harrows.

Corns. The Fauld park, all oats, &c., said by B to be sold and paid for: Byre park, growing beans, &c.

I, J S, servant to the sheriff-clerk of E, to whom the within-mentioned warrant of sequestration is directed, along with S, messenger at arms, hereby not only SEQUESTRATE the cattle, furniture, and other goods and effects contained in the before-written inventory thereof, to the effect mentioned in the said warrant of sequestration; BUT ALSO, in his Majesty's name and authority, and in name and authority of the Sheriff of E, PROHIBIT and DISCHARGE you, the within-designed B, and all others his Majesty's lieges, from meddling or intromitting with all or any part of the goods so sequestrated, directly or indirectly, in any sort, under whatever colour or pretence, until the sequestration be removed, WITH CERTIFICATION to you, and all such as shall presume to do in the contrary, that you will be prosecuted as accords of law. This I do the day of

18 years.

J S.

S, messenger.

A regular execution is extended of the intimation of the petition to the tenant, and of the inventorying and sequestrating the effects, and the petition, with these executions, is moved in court on the day of appearance. If the tenant does not appear, protestation will be taken, and the Sheriff will give an order to roup as much of the effects as may be necessary for paying the rents; or, should the tenant appear, he will be heard why the sequestration ought to be removed, and the judge will

decide according to the justice of the case, and remove the sequestration, or order the roup to proceed, as may be proper.

VI. FORMS UNDER THE ACT OF SEDERUNT 1756.

Summons before the Sheriff for forcing a Tenant to find Caution for Five Crops, under the Act of Sederunt, 14th December 1756.

M, Esq., his Majesty's Sheriff-depute for the shire of E, shewn to me by A, That, by tack, of date , entered into between the complainer on the one part, and B on the other part, the complainer set to the said B, all and whole , and that for the space of , from and after the term of , which is thereby declared to have been the term of entry thereto; and, upon the other part, the said B bound and obliged himself to make payment to the complainer of the sum of £ of tack-duty, and that at two terms in the year, beginning the first term's payment, &c. and so forth termly thereafter, during the currency of the said tack, as the same, containing a penalty of £ , in itself more fully bears: AND WHEREAS, by Act of Sederunt of the Lords of Council and Session, dated the 14th day of December 1756, it is enacted, " That where a tenant shall run in arrear of " one full year's rent, or shall desert his possession and " leave it unlaboured at the usual time of labouring; " in these, or either of these cases, it shall be lawful to " the heritor, or other setter of the lands, to bring his " action against the tenant, before the Judge Ordinary, " who is thereby empowered and required to decern " and ordain the tenant to find caution for the arrears, and " for payment of the rent for the five crops following, " within a certain time, to be limited by the Judge; and " failing thereof, to decern the tenant summarily to re-

“ move, and to eject him in the same manner as if the fact
“ were determined;” and true it is, that the said B, de-
fender, is not only in arrear of rent for more than one
year, being at present indebted to the complainer in the
sum of £

Sterling, as the arrears of rent
due at the term of Whitsunday last, but has deserted his
possession, and has suffered part of the farm to be un-
laboured: * THEREFORE, in terms of, and in conformi-
ty with the said Act of Sederunt, the said B, defender,
ought and should be decerned and ordained, to find
caution to pay to the complainer the said sum of
£

Sterling, being the arrears of rent due by him
at the said term of Whitsunday last; AND ALSO to find
sufficient caution to pay the complainer £
yearly, as the rent of the said farm, for the five follow-
ing crops, viz. from the said term of Whitsunday last to
the term of Whitsunday 18 , inclusive, payable at the
terms, and in the proportions above specified; AND
FAILING of the said B's finding caution, he ought and
should be decerned and ordained, instantly to flit and re-
move himself, his wife, family, servants, cottars, and de-
pendants, goods and gear, furth and from the said lands
of , and to leave the same void and redd,
to the effect the complainer, and others in his name,
may enter thereto, and peaceably possess and enjoy the
same in all time coming, conform to the laws and daily
practice, used and observed in the like cases in all points,
as is alleged.

THEREFORE, &c. *in common form.*

The defence in this action ought generally to consist
of payment of the year's rent: immediate payment, pre-
vious to any decree being pronounced, will have the

* These seem to be the words of style; but it is unnecessary to prove this
part of the libel, as the allowing the rent to fall in arrear is sufficient.

effect of making the action be dismissed; even a partial payment, which shall reduce the arrears below the year's rent, will have that effect. But, after instituting the action, the landlord cannot be obliged to accept of less than the full arrears, and therefore he will have himself to blame if there should be ground for this defence. The cases stated in the text will point out the other grounds of defence that may occur; and the judgment of the Sheriff may be brought under review of the Court of Session by advocacy.

When no defence occurs, and where the tenant is unable to pay up the whole arrears, he must find caution; and for this purpose the Judge Ordinary will appoint a time. The bond is in the following terms:—

*Bond of Caution, in terms of the Act of Sederunt,
14th December 1756.*

I, B, tenant to A, in the lands of _____,
CONSIDERING that the said A has raised and insisted in a
process against me, before the Sheriff of E—, conclud-
ing for my finding caution for payment of the sum of
£ _____, as a year's rent of my said possession, at
the term of _____, for which I have fallen in ar-
rears, and for the rent of five subsequent crops, during
which period the tack between us subsists; and failing of
my finding such caution, that I shall be removed from
my possession, in terms of an Act of Sederunt of the
Lords of Council and Session, dated the 14th day of De-
cember 1756; AND the said Sheriff, by an interlocutor
bearing date the _____, having ordained me to
find caution to the effect under written: THEREFORE,
in obedience to the said interlocutor, I, the said B, as
principal, and I, L, as cautioner for and with the said B,
bind and oblige ourselves, our heirs, executors, and suc-
cessors, to make payment to the said A of the foresaid
sum of £ _____, being one year's rent of the said

possession, which fell due at _____, and that against _____ next, with a fifth part more of liquidate penalty, in case of failure, and the legal interest of the said sum, from the foresaid term of _____, at which terms the same fell due, and in time coming till payment: AND ALSO to make regular payment of the rent of the said possession for the five crops next ensuing, at the terms, in the manner, and under the penalty specified in the said tack. AND I, the said B, hereby bind and oblige me and my foresaids, to relieve the said L and his foresaids, from all loss, damage, interest, or expense which they may sustain through this cautionary obligation. AND WE CONSENT to the registration hereof in the books of Council and Session, or others competent, that letters of horning, on six days charge, and all other execution necessary, may proceed on a decree to be interponed hereto, in form as effeirs, and for that purpose we constitute _____ our procurators, &c.

IN WITNESS WHEREOF, &c.

This security being granted, and the cautioner approved of, the tenant is allowed to retain his possession; and on every future failure, as to these five crops, diligence may proceed upon this bond of caution against the tenant and his cautioner.

Where the cautioner is not approved of, or where caution is not found, the tenant, in terms of the act, will be removed from his possession by the decree of the Judge Ordinary.

VII. FORMS OF THE CONSTITUTION OF THE BARON COURT, AND PROCEEDINGS THEREIN.

The baron, or the heritable proprietor holding of the Crown, does not judge himself, but acts by a bailie, to whom he gives a commission in the following terms:

Commission to the Bailie.

I, A, heritable proprietor of the lands herein after-mentioned, do hereby CONSTITUTE and APPOINT N to be my baron bailie over my lands of , comprehending therein the lands and others following (*here describe them*), all lying within the parish of , and shire of , with full power to the said N to call, begin, fence, hold, and continue baron courts within any part of the said lands, as often as he shall think expedient, either for in-bringing and collecting the rents, feu-duties, and others due to me, furth of the said lands, and others; or for any other cause which by the laws and customs of the realm falls within the jurisdiction of a baron bailie: WITH POWER to appoint clerks, fiscals, officers, and all other necessary members of court, or to substitute bailies under him to act in his absence, but for whom he shall not be answerable; and to cause call suits, fine and amerciate absents, punish transgressors, and poind and distrain for not payment of the rents, and other profits and duties, or fines, or amerciements, and to use and do all other acts and things which any other baron bailie may lawfully do: Reserving always to me the division and distribution of all such fines and amerciements, with power to mitigate and modify such fines, as I shall judge reasonable: DECLARING that this commission of bailiary shall continue in full force, until the same shall be recalled by me. AND I CONSENT to the REGISTRATION hereof in the books of Council and Session, or others competent, therein to remain for preservation, and for that purpose constitute

my procurators, &c. IN WITNESS
WHEREOF, &c.

Before the bailie can act under this commission, he is directed, by the statute, 20th Geo. II. c. 43, to take

the oaths to government, and he then appoints a clerk of court, a fiscal, and officer, for executing his sentences. When a court is called, the form is to fence it, as it is termed, which is done by the officer repeating or reading as follows: " I DEFEND and FORBID, in
 " his Majesty's name and authority, and in name and
 " authority of A and N his baron bailie, any person or
 " persons to take speech upon them, without leave ask-
 " ed and given; or in any shape to trouble or molest
 " this court, under the pains of law: God save the
 " King." After which the judge proceeds to the business for which the court is called.

It has been explained in the text,* how little the criminal jurisdiction of the baron is exercised, even where a criminal jurisdiction is possessed, and that the civil jurisdiction extends no farther than to small causes between those dwelling on the lands where the demand does not exceed forty shillings, and to the power of recovering feu-duties and rents. It is the last of these only to which it is necessary to attend at present.

In this court it is competent for the landlord to pursue for arrears of rent, and the decree of the baron bailie can be enforced only by poinding. But as this requires an acquaintance with the forms of proceeding, of which the officer of a baron court is not always possessed, this business will in general be sent to the sheriff-court, in order that all questions of damages, from informal procedure, may be avoided. I shall therefore give the forms very shortly.

Summons before the Baron Court.

COMPLAINS A against B, That, in terms of a tack entered into between them, of date _____, the said B was due to the complainer the sum of £ _____ at Whitsunday _____, as the first half year's rent of crop

* *Supra*, p. 434.

and year ; with the interest thereof from that term, and a fifth part more incurred through failure; AS ALSO, (*here mention the other term's rent*): THEREFORE, the said defender OUGHT and SHOULD be DECERNED and ORDAINED, to make payment to the complainer of the said sum of £ Sterling, being the half year's rent due at Whitsunday , (*here mention the other term's rent*), with the interest of the said sums from the respective terms of payment above specified, during the not payment thereof, together with a fifth part more of penalty incurred through failure; and further, of the sum of £ , of expense of plea.

On this summons the defender may be cited verbally; but the officer returns an execution, bearing, " That
 " upon the day of , I , baron
 " officer of , lawfully summoned, warned,
 " and charged, B, to appear in the said baron court
 " held at , upon the day of , to
 " answer at the instance of A pursuer, in the hour of
 " cause, with certification to him, as effairs. This I
 " did, by summoning the said B personally, apprehend-
 " ed within the said lands; and I made certification be-
 " fore C and D, witnesses thereto." When the defend-
 er does not appear on a verbal citation, the execution is verified by the officer upon oath, which oath, written on the back of the execution, is signed by him and the Judge.

On the appearance of the parties, a minute is entered in the court books: At , the day of , in presence of N, baron bailie, com-
 peared A, pursuer, and produced the summons, at his instance, against B, with the officer's execution of cita-
 tion therein dated, and the principal tack betwixt the parties therein libelled, and craved decree in terms of the conclusions of the summons. The defender appear-
 ing, (*here the plea will be stated, whatever it may be, whe-*

*ther a confession or denial of the debt or a plea of compensation or retention, on which the Judge will determine), de-
cerns, &c., as circumstances may direct.*

This decree may be suspended or advocated by applying to the Court of Session; and, in that case, the principal minutes may be called for, and must be produced in the Court of Review. The decree may be enforced by poinding; and, it has this peculiarity, that it does not require the days of the charge to expire, the poinding may be instantly executed, the act 1669, which requires a charge before other poindings can proceed, having expressly permitted the poinding on the decree of a baron bailie to remain on its former footing.

Where a poinding is executed on this decree, the execution of the officer may be in these terms:—

Execution of Poinding.

I, _____, baron officer of _____, by
virtue of a precept of poinding, dated _____, at
the instance of A against B, passed to the house and
lands possessed by the said B, lying, &c., from thence I
carried the goods after mentioned to the ordinary place
of poinding, where, after crying of three several oyeses,
open proclamation, and public reading of the said prayer,
I apprehended the effects after-mentioned, pertaining
and belonging to the said B. *Imprimis*, two stacks
of oats, two stacks of hay, &c.; and then and there, after
exposing the horses and cattle, and samples of the corn
and hay, I adduced and appolated L and M licenced
appraisers, to whom I administered the oath of fidelity;
and they having sworn the said oath, and inspected the
goods and samples, they valued the same in manner following,
viz. each boll of the said oats, with the fodder, at _____,
&c. And I made three several times offer back again of the said goods to the said B, or to
any person in his name, who would compear and make
payment to the said A of the particular sums to which

the same were comprised ; and in regard none appeared to that effect, nor to pretend right to the goods, I, by virtue of the said warrant of poinding, adjudged, decerned, and declared the same to pertain and belong to the said A, and delivered the same to
 , as procurator for him, in manner following, to wit, the said horses by the ear, and the said corn by rips, and pieces of each kind, as symbols for the whole, as use is; and that in part payment and satisfaction of the rent contained in the warrant ; whereupon the said
 , as procurator for the said A, asked and took instruments in the hands of
 , notary-public. This I did in terms of the said warrant of poinding, in all points, before these witnesses, P and Q. AND THEREAFTER, upon the day of , and year foresaid, I, the said officer, returned to the corn-yard on the said subjects, in order to cast the said stacks of oats, and to weigh the said hay ; and there I adduced and designed R to be caster, thresher, dichter, and measurer, of the said corns, and weigher of the said hay, to whom I administered the oath of fidelity, and who having accordingly taken the said oath, and the corns being cast to the proof, threshed, dighted, and measured, and the said hay and other goods being weighed, the same did extend and amount to the particular quantities after-mentioned, viz. &c. All which goods above-mentioned, amount in money, at the particular prices above-mentioned, to the sum of £ . And I left upon the ground where the said goods were poinded, an exact note and list of the same, and prices thereof ; and for the more verification of this my execution, I, and the notary-public, and the foresaid witnesses, sign these presents.

It is obvious that this form of attaching the effects of a tenant is only calculated for the case where the landlord has lost his right of hypothec, for where that right remains, he has a more immediate means of attaching the effects of his tenant by the sequestration.

Petition of Sequestration.

Unto the Honourable Baron Bailie of the Barony
of

The Petition of A, Esq.;

Humbly sheweth,

That, by tack, of date _____, entered into between the petitioner on the one part, and B on the other, the petitioner set to the said B, &c. all and whole, &c. and that for the space of _____, &c.; and, upon the other part, the said B bound and obliged him, his heirs and successors, to make payment to the petitioner of the sum of £ _____ Sterling of tack-duty, payable, &c. That the said B, besides arrears, is resting the sum of £ _____ Sterling, as the current year's rent from _____ to _____; and the petitioner being informed that B is carrying his cattle and others, which are subject to the petitioner's hypothec, off the farm, the present application becomes necessary.

May it therefore please your Honour to grant warrant to your clerk to repair to the foresaid lands, and to inventory, sequestrate, and roup as much of the corns, cattle, and other goods and effects on the said farm as will completely satisfy and pay the petitioner the current year's rent, with the expense of sequestrating and rousing.

According to justice, &c.

(Signed by the heritor or his factor.)

On this petition, the baron bailie will grant a warrant to the clerk of court to sequestrate the effects of the tenant, and order the petition to be intimated to the tenant, that he may, if he chooses, give in answers thereto, and a certain time will be mentioned in the interlocutor, within which the answers must be lodged.

On this deliverance the officer will inventory the effects of the tenant, and, in terms of the authority of the

Judge, declare them to be sequestrated; and the officer will then leave a copy of the petition of sequestration, the Judge's deliverance thereon, and a copy of the inventory of the effects, with the tenant.

If answers are lodged for the tenant, the matter will be judged of by the bailie; but if no answer is made, a warrant to roup as much as will pay the rent will be given, and on that warrant a sale of the sequestrated goods may take place.

VIII. ACTIONS OF REMOVING, AND FORMS CONNECTED THEREWITH.

The act 1555, c. 39, for two centuries previous to the Act of Sederunt 1756, afforded the sole rule for removing tenants; the forms of that statute have not abrogated, although they have been nearly superseded in practice by those prescribed by the Act of Sederunt; and as this subject would be incomplete without the more ancient forms, I shall insert them along with the statute, as explanatory of them.

Anent the warning of Tenants, 1555, c. 39.

ITEM, It is statute and ordainit, that in all time coming, the warning of all tenants and others, to flit and remove fra lands, milnes, fishings, and possessiones, quhatsumever, sall be used in manner following, That is to say, lauchfull warning being made ony time within the zeir fourtie days before the feast of Whitsunday, outhir personally or at their dwelling-places, and at the ground of the lands, and ane copie delivered to the wife or servantes, and failzieing thereof, to be affixed upon the zettes or doores of the dwelling places of the said lands, gif onie be; and thereafter the samin precept of warning to be red in the paroch-kirk quhair the landis lyis,

upon ane Sabbath-daye before noone, the time of preaching or prayers, and ane copie left and affixed upon the most patent doore of the kirk fourtie days before the term, and na furdur laying furth of stresses and removing upon Wednesday, to be used in time to come; and gif the partie warned in manner foresaid remove not at the terme, in that case, the warner sall incontinent, or so soon as pleises him, come to the Lords of Council or to the Sheriff of the shire, or other Judges ordinaris having jurisdiction, schawand his precept of warning orderly execute and indorsate, and sall have letters or precept to charge the parties warned, and possessors of that ground, to compeir before the said Lords, Sheriffs, or their deputies, or other judges ordinares foresaid, having jurisdiction, upon six days warning, or longer, at the will and desire of the persewar, to hear and see them decerned to remove, desist, and cease, conform to the precept of warning and execution thereof, or else to schaw ane reasonable cause quhy they should not do the samen; with certification to them, an they failzie, that letters sall be direct simpliciter upon them in the said matter. At the quhilk day, gif they compear not, the Lordes, Sheriffes, or other judges ordinar, having jurisdiction, sall decern them to remove, desist, and cease fra the landes. And gif they compier, and instantly schawis sufficient title to bruik the landes, in that case, the samen judge to proceed and do justice as accords of lawe. And gif the partie compieris and shaws nothing, bot makis alleageance, and offers him to improve the indorsation; in that case, he sall not be heard in judgement; but gif he find sufficient caution to the warner then instantly that gif his alleageance being funden relevant, be not sufficiently verified and proven be him, that the profits, damage, and interest quilkis the said warner, or any uthers having interest, has sustained, or sall happen to susteine be the delay of the foresaid al-

legeance, be refunded to him; and to the effect that this ordour may have sufficient processe in all times to cum, it is devised, statute, and ordaind, that all Sheriffs and uthers, judges ordinar, havand jurisdiction as said is, be their selves or their sufficient deputes, be red-die to sit be fenced courtes, all the lauchfull fifteen dayes after immediately the feast of Trinitie Sunday, for doing of justice in the said causes in manner above specified: and gif the Schireffes or judges ordinares havand jurisdiction in manner foresaid, and their deputes, fail-zies to be reddie in granting of precepts and doing of justice, for observing of this ordour; in that case they sall pay to the partie their haill dammage, interesse, and expences, but prejudice of the action against the violent occupiars and possessars foresaidis.

And als that na advocation of causes be taken be the Lords fra the judge ordinar, except it be for deadlie feede, or the Sheriffe principal, or the judge ordinar be partie, or the causes of the Lordes of Councill, and their Advocates, scribes and members.

Precept of Warning.

I, A B, heritable proprietor of the lands and others after mentioned, To
my officers in that part, jointly and severally, specially constituted, greeting, It is my WILL, and I REQUIRE you, THAT upon sight hereof ye pass, forty days preceding the term of Whitsunday next to come, and, conform to act of Parliament, lawfully PREMONISH, WARN, and CHARGE C D, tenant and possessor of the lands of
, to FLIT and REMOVE himself, wife, family, servants, cottars, and dependants, goods and gear, forth and from ALL and WHOLE, (*here describe the subjects shortly*), as the same are at present occupied and possessed by the said C D, and to desist and cease from the possession of the said subjects, and leave the same

void and redd, and that at the term of Whitsunday next, (or at the term of , expressing precisely the terms of removing in the lease), to the effect that I, my tenants, sub-tenants, and others in my name, may enter to the peaceable possession thereof, and bruik, enjoy, let, and dispose thereof, at our pleasure, in all time coming thereafter; AND for that end, that ye deliver a copy of warning, subscribed by you, to the said C D personally, or at his dwelling-place, and that ye leave the like copy of warning, subscribed by you, upon the ground of the foresaid lands: AND in like manner, THAT on a Sunday, forty days preceding the said term of Whitsunday, ye pass to the parish-church doors of , within which parish the said lands lie, and there, after divine service in the forenoon, audibly read, or cause to be read, this my precept of warning; AND THAT ye affix and leave a just copy thereof, subscribed by you, upon the most patent door of the said church, that none may pretend ignorance hereof; AND THAT ye use the whole remanent order prescribed by act of Parliament made thereanent: WITH certification to the said C D and his foresaids, if they fail to remove, as-said is, and if they continue to occupy, labour, and possess the said lands and others after the said terms at which they are charged to remove, they shall be holden and reputed violent possessors, and made liable in the violent profits thereof, conform to the laws and daily practice, observed in the like cases in all points; AND this in no wise ye leave undone; WHICH TO DO I commit to you, and each of you, jointly and severally, as said is, my officers in that part, my full power, by this my precept. In witness whereof, &c.

Copy delivered by the Officer.

I, L M, officer in that part, specially constituted, by virtue of a precept of warning issued by A B, heritable

proprietor of the subjects after specified, do hereby lawfully PREMONISH, WARN, and CHARGE you, C D, tenant in the said lands, to flit and remove yourself, your wife, family, servants, cottars, and dependants, goods and gear, forth and from all and whole (*here describe the lands*), as the same are at present occupied and possessed by you, and to desist and cease from the possession of the said lands, and leave the same void and redd, and that at the term of , to the effect that the said A B, his tenants, sub-tenants, and others in his name, may enter to the peaceable possession thereof, and bruik, enjoy, let, and dispose thereof at their pleasure in all time coming, conform to the said A B's rights and infeftments thereof, with certification to you, conform to the said precept of warning in all points; which precept is dated : THIS I do, on the day of , in presence of these witnesses, and
 This is signed by the officer.

Copy left on the Church-door.

The practice is, either to leave a full copy of the precept of warning affixed to the church-door, or a charge to remove, reciting the terms of the precept of warning; and the same must be done on the ground of the lands. The execution returned by the officer is in these terms:

Execution returned by the Officer.

Upon the day of , I, L. M, officer in that part, specially constituted, by the precept of warning, issued at the instance of A B, heritable proprietor of the lands and others after-mentioned, passed, and, by virtue thereof, I lawfully PREMONISHED,

WARNED, and CHARGED C D, tenant of all and whole
 , to FLIT and REMOVE himself, his wife,
 family, servants, cottars, and dependants, goods and
 gear, forth and from all and whole , at
 the said term of , and to desist and cease
 therefrom, and leave the same void and redd at the said
 term, to the effect the said A B by himself, or others
 in his name, may then enter thereto, and peaceably pos-
 sess and enjoy the same, and let and dispose thereof at
 his pleasure in all time coming, conform to his rights
 and infestments thereof; AND ALSO, upon the day of
 the said month and year, being Sunday, in the forenoon
 in the time of divine service, I passed to the most patent
 door of the parish-church of , and there at, in
 virtue of the said precept of warning, and after making
 public intimation and open proclamation thereof, and
 crying of three several oyesses, as use is, in presence of
 the congregation then assembled, I lawfully PREMONISH-
 ED, warned, and charged the said C D to flit and re-
 move himself and his foresaids, in manner; and to the
 effect, and at the term above-specified, that none might
 pretend ignorance thereof: AND I made certification to
 them, conform to the said precept of warning in all
 points. THIS I DID, by delivering to the said C D,
 personally apprehended, (*or, by leaving at his dwelling-
 house, with a servant therein, to be given to him, as I
 could not find himself personally; or by affixing on the
 most patent door of the dwelling-house of the said C D,
 as I could not get admission thereto,*) a written copy,
 subscribed by me, bearing the date of the delivery
 thereof, date and substance of the said precept of warn-
 ing, and the names and designations of the witnesses
 subscribing, present thereat; AND ALSO, by leaving and
 affixing the like copy, subscribed by me, at and upon
 the ground of the lands, and upon the said kirk-door,
 before and , witnesses

to the premises specially called and required, and here-
to with me subscribing.

L M, officer.

N O, *witness.*

P Q, *witness.*

Where the tenant is out of the kingdom, it has been
thought necessary to warn him on sixty days, by means
of letters of supplement.

Letters of Supplement of a Precept of Warning.

GEORGE, &c. WHEREAS it is humbly meant and shewn
to us, by our LOVING A, heritable proprietor of the lands
and others after mentioned; THAT he has issued his pre-
cept of warning, directed to his officer, bearing date
, for warning B, tacksman of the said lands,
by a tack granted by the complainer to him on the
, to flit and remove himself, his
wife, bairns, servants, sub-tenants, cottars, goods, and
gear, furth and from the lands of , with the
houses, biggings, and pertinents thereof, all lying in the
parish of , and shire of , and set
to him by the foresaid tack, and to leave the same void
and redd, and that at the term of Whitsunday next to
come, to the effect the complainer, his tenants, servants,
and others in his name, may enter thereto, and peaceably
possess, labour, and occupy the same, and use and dis-
pose thereof at pleasure; with certification to him, if
he fail, he shall be held in violent possession of the
said lands, houses, and others foresaid, and be liable
in the violent profits of the same, conform to law. But
in regard the said B is at present furth of Scotland,
THEREFORE, necessary it is for the complainer to have
these our letters, directed at his instance, in manner-un-
derwritten, as is alleged.

OUR WILL IS HEREOF, and we charge you, that, on
sight hereof, ye pass FORTY DAYS preceding the term of

Whitsunday next to come; and in supplement of the said precept of warning, lawfully SUMMON, WARN, and CHARGE the said B, by open proclamation, at the market-cross of Edinburgh, pier and shore of Leith, to flit and remove himself, his wife, bairns, servants, sub-tenants, cottars, goods, and gear, furth and from the lands, houses, biggings, and others above-mentioned, and to leave the same void and redd, and that at the said term of Whitsunday next to come, to the effect the complainer, his servants, tenants, and others in his name, may enter thereto, and peaceably possess, labour, and occupy the same, and use and dispose thereof at pleasure; with certification to the said B if he shall fail, he shall be held and reputed a violent possessor of the said lands, houses, and others, and be liable in the violent profits, conform to act of Parliament made thereanent. ACCORDING TO JUSTICE, as ye will answer to us thereupon; WHICH to do we commit to you, jointly and severally, full power, by these our letters, delivering them by you duly executed, and indorsed again to the bearer. GIVEN under our signet at EDINBURGH, the day of , and year of our reign, 18 .

EX DELIBERATIONE DOMINORUM CONCILII, &c.

Signed by a Writer to the Signet.

These letters pass on a bill, and are executed edictally at the market-cross of Edinburgh, and pier and shore of Leith. But so unnecessary is this form, and so little authorised or required by the statute, that this execution, which, had the letters of supplement been of any value, would have sufficed, is repeated at the dwelling-house of the tenant on the farm, and at the church-door.

This form of warning by means of the precept being completed, the act of Parliament directs the proprietor, in case of the tenant's not removing, to apply to the

Judge Ordinary for a warrant to remove him. This is done by a summons, in these terms :

Summons of Removing.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us by OUR LOVITE A B, heritable proprietor of the lands and others under written, conform to charter, dated , and instrument of sasine thereupon in his favour, dated , and recorded , That in virtue of a precept of warning subscribed by the pursuer, he, on the , forty days previous to the term of Whitsunday , in terms of the act 1555, c. 39, caused L M, his officer in that part, specially constituted by the said precept, pass, and lawfully warn and charge C D, tenant in the lands and others after-mentioned, viz. (*here mention the lands*) to sit and remove himself, his wife, family, servants, cottars, and dependants, goods and gear, forth and from the said lands and others foresaid, and to leave the same void and redd at the term of , to the effect that the pursuer, by himself, or others in his name, might enter thereto, and peaceably possess and enjoy the same, and let and dispose thereof at pleasure; and the said officer passed on the to the ground of the said lands, and left a copy of warning thereon; and that upon the , being Sunday, he passed to the parish-church door of , within which parish the said lands lie, and there, immediately after divine service in the forenoon, audibly read the said precept of warning, in presence of the congregation there assembled, and affixed and left a copy of warning on the most patent door of the said church, that none might pretend

ignorance; as the said precept of warning, and executions thereof more fully bear. **THEREFORE**, the said **C D OUGHT** and **SUOULD** be **DECERNED** and **ORDAINED**, by decree of our Lords of our Council and Session, to flit and remove himself, his wife, family, servants, cottars, dependants, goods and gear, forth and from the said lands and others foresaid, and that at the said term of _____, and to leave the same void and redd, to the effect the pursuer, by himself, his servants, and others foresaid, may enter thereto, and possess, labour, and enjoy the same at pleasure, in time coming: **AND** the said **C D OUGHT** and **SHOULD** be further **DECERNED** and **ORDAINED**, by decree foresaid, to make payment to the pursuer of the sum of _____, or such other sum as our said Lords shall modify as the expense of the process to follow hereon, besides the expense of extracting the decree to be pronounced therein, after the form and tenor of the writings libelled on, and laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOFRE, &c. (The will of the summons is in the ordinary form: it has only one diet of six days, in terms of the act, and requires a bill.)

This summons (if resorted to) may be brought either before the Court of Session or Sheriff; and it is attended with a peculiarity, which is well explained by Mr. Ross, in the Essay on this subject, to which I have already had occasion to refer. Where the decree was obtained before the Court of Session, the only means which were used for enforcing it, was the raising of letters of horning, and charging the tenant to remove, and in case of his refusal, the letters and their execution were a warrant for ejection; a tedious and circuitous method of attaining an object that is directly and at once obtained where the decree is pronounced in the Sheriff-court; for the Sheriff immediately is-

gives a precept of ejection, and if the tenant does not remove in twenty-four hours, the Sheriff's precept is executed, and the tenant dispossessed.

I shall now give the form of the ejection, on the decree of the Court of Session.

Horning on a Decree of Removing.

GEORGE, &c. WHEREAS OUR LOVITE A B, of the date hereof, obtained decree at his instance, before our Lords of Council and Session, against C D, DECERNING and ORDAINING him (for the causes therein specified) to flit and remove himself, his wife, family, servants, cottars, and dependants, goods and gear, forth and from (*here the lands will be described in the words of the decree*), and to leave the same void and redd, at the term of

, to the effect the complainer, or others in his name, may then enter thereto, and possess and enjoy the same in time coming; AND FURTHER DECERNING and ORDAINING the said C D to make payment to the said A B, of the sum of £ as the expenses of process; AS ALSO of the expense of extracting the said decree, as the same, ordaining these our letters, in manner under written, more fully bears. OUR WILL IS HEREOF, and we charge you, that on sight hereof ye pass, and, in our name and authority, COMMAND and CHARGE the said C D personally, or at his dwelling-place, to make payment to the said A B of the foresaid sum of £, as the expense of

the process, and of the sum of £ as the expense of extracting the said decree, after the form and tenor of the said decree in all points, WITHIN FIFTEEN DAYS next after he is charged by you thereto; AS ALSO, That ye, in our name and authority foresaid, COMMAND and CHARGE the said C D personally, or at his dwelling-place, to flit and remove himself, his wife, family, servants, cottars, and dependants, goods and gear, forth and

from the foresaid lands and others, with their pertinents, and to leave the same void and redd AT the said TERM of , in case the said charge shall be given six days preceding the term of , to the effect the complainer, or others in his name, may enter thereto, and possess and enjoy the same in time coming; And in case the said charge shall be given within less than six days of the said term of , or after the said term, then, WITHIN SIX DAYS next after he is charged by you thereto, UNDER the pain of ejection, AND ALSO, under the pain of rebellion and putting of him to the horn; wherein, if he fail, the said respective spaces being elapsed, that immediately thereafter ye denounce him our rebel, put him to the horn, and use the whole other order against him prescribed by law: FURTHER, That ye lawfully fence, arrest, appraise, compel, poind, and distrain, ALL and SUNDEY, the said C D's whole readiest moveables of whatever denomination, MAKE PENNY thereof to the avail and quantity of the foresaid sums, and see the said A B completely paid and satisfied of the same. ACCORDING TO JUSTICE, as ye will answer to us thereupon. WHICH TO DO, we commit to you, and each of you, full power, by these our letters, delivering them, by you duly executed and indorsed again to the bearer. GIVEN under our Signet, AT EDINBURGH, the day of , in the year of our reign.

PER DECRETUM DOMINORUM CONCILII.

Where expenses have not been awarded, there will be no charge to make payment of any sum to the landlord; and, of course, the clause of fencing and arresting will be left out, and the letters of horning be only for enforcing the decree of removing.

Upon this horning the tenant is charged; the days of the charge being expired, he is denounced rebel; and the horning being put on record, letters of cap-

tion or of ejection may be applied for. The letters of caption are in common form; the letters of ejection proceed on a bill, amongst with which the registered horning is produced.

Letters of Ejection.

GEORGE THE FOURTH, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To

messengers at arms, our sheriffs in that part, jointly and severally, specially constituted, greeting, WHEREAS it is humbly meant and shewn to us by our LOVITE A B, heritable proprietor of the lands and others after mentioned, THAT, on the day of , the complainer obtained decree of removing, at his instapce, before the Lords of our Council and Session, against C D, tenant and possessor of the lands of , DECREENING and ORDAINING him to flit and remove himself, his wife, family, servants, cottars, dependants, goods, and gear, forth and from the said lands, and to leave the same void and redd at the term of last, to the effect the complainer by himself, or others in his name, might then enter thereto, and peaceably labour and enjoy the same at his pleasure in all time coming, as the said decree more fully bears; WHEREUPON, the complainer raised letters of horning against the said C D; and, by virtue thereof, caused , messenger, pass, upon the day of last, and lawfully command and charge the said C D to flit and remove himself and his foressaids from the said lands, in terms of the said decree, under the pain of rebellion, and putting him to the horn; and he having disobeyed the said charge, was, on the day of , denounced rebel, and put to the horn, as the said letters of horning, with the executions thereof, duly re-

corded, shewn to the said Lords, have testified: NOTWITHSTANDING whereof, the said C D still continues in the possession of the said farm, and will not remove himself and his foresaids therefrom, to the effect above specified, unless compelled; THEREFORE, necessary it is for the complainer to have these our letters, directed, at his instance, in manner and to the effect underwritten.

OUR WILL IS HEREOF, and we charge you, that, on sight hereof, ye pass, and in our name and authority command and charge the Sheriff-depute of and his Substitutes, within whose jurisdiction the said lands lie, and the said C D resides, to EJECT, FLIT, and REMOVE the said C D, possessor of the said lands and others foresaid, his wife, family, servants, cottars, dependants, goods and gear, forth and from the lands and others above written, and to put the complainer, his tenants, servants, or others in his name, in the peaceable possession thereof, AND to use all the solemnities usual and requisite in the like cases, after the form and tenor of the said decree of removing, registered horn-ing following thereon, and these our letters, in all points, WITHIN SIX DAYS after they are charged by you thereto, under the pain of rebellion, and putting them to the horn; WITH CERTIFICATION to them, if they fail, the said space being elapsed, our other letters will be directed against them, charging them thereto *simpliciter*. ACCORDING TO JUSTICE, (because the Lords have seen the registered horn-ing above mentioned), as ye will answer to us thereupon: WHICH to do we commit to you, and each of you, full power, by these our letters, delivering them, by you duly executed and indorsed again to the bearer. GIVEN under our signet, AT EDINBURGH, the day of 1568 in the year of our reign.

EX DELIBERATIONE DOMINORUM CONCILII.

These letters are directed to the Sheriff alone, and it is only by a warrant from him that a messenger can be authorised to act. The form of procedure is this:— The letters of ejection are produced to the Sheriff, who issues a precept, ordering his officers to execute the removing, in terms of the will of the letters; and on this joint authority of the letters of ejection and the Sheriff's precept, the removing is carried into effect.

This is the form of removing upon a decree obtained before the Court of Session; and it is not only encumbered with forms, but a much longer time must intervene before the tenant can be removed, than where the removing is brought before the inferior court; for in the first place, the days of charge on the horning must have elapsed, and then the letters of ejection must also have been raised, and the procedure above mentioned completed, before the removing can take place; so that it is not surprising that these forms should have fallen into disuse.

These proceedings in the removing under the act 1555, were often the source of much vexation to the landlord, from the necessity of observing the different forms which had been prescribed in the execution of the warning, and it often happened that the action was set aside, and the tenant allowed to remain in possession. It was the repeated delays and disappointments which this system of forms occasioned, which led to the Act of Sederunt, 14th December 1756, which has been attended with a most beneficial operation.

Act of Sederunt, 14th December 1756.

WHEREAS the difficulties that have occurred in actions of removings from lands, have been found to be highly prejudicial to agriculture, and both to masters and tenants, in respect that, during the dependence of such actions, the lands are neglected and deteriorated by the



defender, and the heritor's security for his rent brought into danger, and tenants are discouraged from entering into tacks, by the uncertainty of their attaining to possession and by their finding the subject of their tack much deteriorated during the dependence of the process of removing against the preceding tenant; the Lords of Council and Session, resolving to remedy this great evil, do make the following regulations, viz.—*1mo*, That where a tenant is bound by his tack to remove without warning, at the issue or determination of his tack, it shall be lawful to the heritor, or other setter of the tack, upon such obligation, to obtain letters of horning, and thereupon to charge the tenant with horning forty days preceding the term of Whitsunday in the year in which his tack is to determine, or forty days preceding any other term of Whitsunday thereafter; and, upon production of such tack and horning, duly executed, to the deputy Sheriff or Stewart, or their Substitutes, of the shire or stewartry where the lands lie, they are hereby authorised and required, within six days after the term of removal appointed by the tack, to eject such tenant, and to deliver the possession void to the setter, or those having right from him. *2do*, Where the tenant hath not obliged himself to remove without warning; in such case it shall be lawful to the heritor, or other setter of the tack, in his option, either to use the order prescribed in the act of Parliament made in the year 1555, entitled, *Act anent the Warning of Tenants*, and thereupon pursue a warning and ejection, or to bring his action of removing against the tenant before the Judge Ordinary; and such action being called before the Judge Ordinary, at least forty days before the term of Whitsunday, shall be held as equal to a warning execute in terms of the foresaid act; and the Judge shall thereupon proceed to determine in the removing, in the terms of that act, in the same manner as if a warning had been executed in terms of the foresaid act of Parliament. *3tio*, Where a

tack is assigned, and the assignation not intimated by an instrument, or where lands are subset, in whole or in part, to sub-tenants, such horning execute as aforesaid, or where process of removing and decret is obtained, or where warning, in terms of the act 1555, is used against the principal original tacksman, the same shall be effectual against the assignees or sub-tenants, one or more; and the action of removing against the principal or original tacksman, and decret of removing following thereon, shall be effectual against such assignees and sub-tenants as aforesaid, and shall be sufficient ground of ejecting them, any thing in the former practice to the contrary notwithstanding. *4to*, Where a tenant hath irritated his tack, by suffering two years' rent to be in arrear, it shall be lawful to the setter or heritor to declare the irritancy before the Judge Ordinary, and to insist in a summar removing before him; and it shall be lawful to the Sheriff or Stewart-depute, or their Substitutes, to find the irritancy incurred, and to decern in the removing, any practice to the contrary notwithstanding. *5to*, Where a tenant shall run in arrear in one full year's rent, or shall desert his possession, and leave it unlaboured at the usual time of labouring, in these, or either of these cases, it shall be lawful to the heritor or other setter of the lands, to bring his action against the tenant before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for five crops following, or during the currency of the tack, if the tack is of shorter endurance than five years, within a certain time to be limited by the Judge; and failing thereof, to decern the tenant summarily to remove, and to eject him, in the same manner as if the tack were determined, and the tenant had been legally warned, in the terms of the foresaid act 1555. *6to*, The Lords hereby enact and declare, that no bill of advocation, or suspension of a decree or pro-

cess of removing, be passed otherwise than by three Lords in time of vacance, and by the whole Lords in presence in time of Session, (*this regulation was altered by Act of Sederunt 10th August 1756, and any two of the Lords in time of vacance, were allowed to pass bills of suspension and advocation*): Provided always, That in vacation time, and when three Lords cannot easily be found, it shall be lawful to the Lord Ordinary on the hills, upon such bills of suspension to grant sists from time to time as he shall judge proper, to the end that the complainer may have access to present his bill of suspension to three Lords or to the Court. And they hereby ordain, that upon passing such bill of advocation or suspension, or at least within ten days after the date of the deliverance thereon, the complainer shall be obliged to find sufficient caution, not only for implement of what shall be decreed on the advocation or suspension upon discussing thereof, but also for damage and expense, in case the same shall be found due. And upon the complainers failing to find caution as aforesaid, such bill of advocation or suspension shall be held to be refused; and it shall be lawful for the other party to proceed in his action of removing, or in the execution of his decreet, as if no such bill of advocation or suspension had been presented or passed. *7mo*, The Lords do enact and declare, that in all removings, whether originally brought before this Court, or by advocation or suspension, they will proceed and determine the same summarily, without abiding the course of any roll. And ordain this Act of Sederunt to be recorded in the books of Sederunt, and printed and published in the usual form.

The action allowed by this Act of Sederunt is directed to be brought before the Sheriff, where the forms are simpler and more efficacious than in the Court of Session.

Summons of Removing before the Sheriff, in terms of the Act of Sederunt, 14th December 1756.

B C, Esq., his Majesty's Sheriff-depute for the shire of _____, to
 executors hereof, jointly and severally, specially constituted, greeting; WHEREAS it is humbly meant and shewn to me by A B, that the complainer is heritable proprietor of the lands of _____, lying in the parish of _____, and county of _____, and in which lands he stands infest and seized, conform to instrument of sasine in his favours, dated _____, and recorded _____; AND THAT by Act of Sederunt of the Lords of Council and Session, dated 14th December 1756, it is declared, that it shall be lawful to any heritor, or other setter of a tack, in his option, either to use the order prescribed by the Act of Parliament made in the year 1555, entituled, "Act anent the warning of tenants," and thereupon pursue a removing and ejection, or to bring his action of removing before the Judge Ordinary; and such action being called before the Judge Ordinary, at least forty days before the term of Whitsunday, shall be held as equal to a warning executed in terms of the foresaid statute: AND TRUE IT IS, that C D is tenant and possessor of the foresaid lands, and that his lease expires at the term of Whitsunday next; THEREFORE, the said C D OUGHT and SHOULD be DECERNED and ORDAINED, by my decree, to flit and remove himself, his family, servants, cottars, and dependants, goods and gear, forth and from the said lands of _____, with their pertinents, and to leave the same void and redd at the term of Whitsunday next, in this present year, to the effect the complainer, or others in his name, may then enter thereto, and peaceably possess and enjoy the same in all time coming, conform to

law and the daily practice, used and observed in the like cases, as is alleged : HEREOFRE I charge you, that ye lawfully SUMMON, WARN, and CHARGE the said defender, to compear before me or my substitute, upon the day of , in the hour of cause, to answer at the instance of the said complainer ; that is to say, to hear and see the premises verified and proven, and decree given and pronounced *ut supra* ; or else to allege, &c. With certification, &c. ACCORDING TO JUSTICE ; Given AT , and signed by the clerk of court the day of years.

This summons is executed against the tenant, and it must be called in court forty free days before the term of Whitsunday, in the year in which the tenant's lease expires ; and when the action is called in court, decree of removing is immediately pronounced ; or should appearance be made for the tenant, he will be heard in his defence, but in that case caution must be found for the violent profits.

Bond of Caution for Violent Profits.

I, B, considering that A has raised and insisted in an action before the Sheriff of E, for having me removed from the farm of , set to me by him ; in which action the said Sheriff, by interlocutor, dated , ordained me, before further procedure, to find sufficient caution for the violent profits, and to lodge a bond in process in the terms under-written : THEREFORE I, the said B, as principal ; and I, C, as cautioner with and for the said B, bind and oblige ourselves, jointly and severally, our heirs, executors, and successors, to make payment to the said A, of whatever sums of money shall be decreed to be paid by me, the said B, in name of violent profits, in case it shall be found, in the course of the said action, that I have not

been well founded in my defences against the same ; and that under the penalty of £ over and above performance ; and we consent to the registration hereof in the books of Council and Session, or other judges books competent, that letters of horning on six days charge, and all other necessary execution, may proceed on a decree to be pronounced hereon, in common form, and for that purpose constitute
our procurators, &c.

When a decree is pronounced in this action, the Sheriff issues a precept of removing, on which, within forty-eight hours, the tenant may be removed ; and the officer employed returns an execution, stating the ceremony of putting out the tenant's fire, and rekindling a fire in name of the landlord ; but the execution is principally of service in fixing what articles were put out of the tenant's house, and preventing any question as to embezzlement.

It is this form, so simple, and answering so completely all the purposes of the old regulations, which has been introduced by the Act of Sederunt 1756 ; and although I have thought it necessary to preserve the old forms, and even the method of enforcing the decree of the Court of Session, yet it must be obvious, that the removing before the Sheriff is attended with so many advantages, that all removings will likely be brought in this way, that is, all removings, where there is no obligation in the lease obliging the tenant to remove ; for where the lease contains an obligation of that kind, the act provides a means of enforcing the removing equally simple, and certain in the intimation which it gives to the tenant.—It declares, that where the tenant is bound by the lease to remove, the landlord may raise letters of horning on the tack ; and having charged the tenant on these letters forty days preceding the term of Whitsunday in the year he is to remove, the Sheriff, on

production of the tack and horning, must eject the tenant within six days after the term of removal. The horning raised on this occasion is in this form :

Horning on a Tack, in order to force a Removing on the Act of Sederunt.

GEORGE, &c. WHEREAS (*If the tack has been recorded in the Sheriff-court books, and a bill be requisite, say*) WHEREAS it is humbly meant and shewn to us by OUR LOVITE A B, That by tack, &c. (*the proprietor will be called the complainer, and the letters will close with Ex DELIBERATIONE DOMINORUM CONCILII, in the common form of letters of horning on bills; but when the tack has been recorded in the books of Session, it will proceed in the following terms*), by a tack entered into between OUR LOVITE A B, heritable proprietor of the lands and others after specified, ON the ONE PART, and C D ON the OTHER PART, of date the day of , the said A B set to the said C D, his heirs and successors, &c. ALL and WHOLE (*here describe the lands as in the lease*), AND THAT for the space of , from and after , which was thereby declared to have been the term of his entry to the said subjects; AND the said C D BOUND and OBLIGED himself and his foresaids, to flit and remove himself, his wife, family, servants, cottars, and dependants from the possession of the said farm, at the expiration of the said tack, without any warning or process of removing, (*it is necessary to observe, that the terms of this part of the horning are entirely regulated by the terms of clause of the lease, which are copied here verbatim*), as the said tack, registered in the books of our Council and Session, and having a decree of the Lords thereof interponed thereto, of this date, ordaining these our letters to be directed thereon, more fully bears: THAT by the Act of Sederunt of our said Lords, of date the 14th December 1736, entitled, "Act of Se-

“derunt anent removings,” it is, amongst other regulations, appointed, that where a tenant is bound by his tack to remove without warning at the ish or determination of his tack, it shall be lawful to the heritor, or other setter of the tack, upon such obligation, to obtain letters of horning, and thereupon to charge the tenant with horning forty days preceding the term of Whitsunday in the year in which his tack is to determine, or forty days preceding any other term of Whitsunday thereafter; and upon production of such a horning, duly executed, to the Sheriff or Stewart-depute, or their Substitutes, of the shire or stewartry where the lands lie, they are thereby authorised and required, within six days after the term of removal appointed by the tack, to eject such tenant, and to deliver the possession void to the setter, or those having right from him: AND TRUE IT IS, that the foresaid tack expires at the term of ; wherefore necessary it is for our said Lovite to have these our letters directed at his instance, in manner under written.

OUR WILL IS HEREOF, and we CHARGE you, that on sight hereof ye pass, forty days before the term of Whitsunday next to come, and, in our name and authority, lawfully command and charge the said C D personally, or at his dwelling-place, to flit and remove himself, his family, servants, cottars, dependants, goods and gear, forth and from the said lands and others set by the foresaid tack, at the said term of next to come, in the present year , under the pain of rebellion, ejection, and putting of him to the horn; wherein if he fail, the said space being elapsed, that immediately thereafter ye denounce him our rebel, and put him to the horn, and use the whole other order against him prescribed by law. ACCORDING TO JUSTICE, as ye will answer to us thereupon. WHICH to do, we commit to you, and each of you full power, by these our letters delivering them, by you duly execut-

ed and indorsed, again to the bearer. GIVEN under our signet, AT EDINBURGH, the day of , in the year of our reign.

PER DECRETUM DOMINORUM CONCILII.

As the tenant is charged not to pay any sum of money, but *ad factum prestandum*, these letters contain no warrant to poind; and for the same reason the messenger must prefix to the copy served on the tenant a full copy of the letters as far as the WILL, in this form:—

(The Copy for the Tenant will be affixed here.)

I, M N, messenger at arms, by virtue of letters of horning, whereof the above and preceding page is a full double to the will, raised at the instance of A B, IN HIS MAJESTY'S NAME AND AUTHORITY, command and charge you C D, to flit and remove yourself, your family, and others above described, forth and from the lands and others set by the tack above specified, at the term of next, in this present year; AND THAT under the pain of rebellion, ejection, and putting of you to the horn, &c., conform to the principal letters, which are dated , and signeted
THIS I do on the day of years, before these witnesses, O P and Q R, both residenters in Edinburgh.

M N, messenger.

The messenger will then return an execution in these terms:—

Execution of the Horning.

Upon the day of years, I, M N, messenger at arms, passed, at command of the within written letters of horning, raised at the instance of the within designated A B; AND by virtue thereof, in his Majesty's name

and authority, lawfully COMMANDED and CHARGED the also within designed C D, to flit and remove himself, his family, and others within described, forth and from the lands and others set by the tack therein specified, at the term of next, in this present year; AND THAT under the pain of rebellion, ejection, and putting of him to the horn. THIS I DID, after the form and tenor of the within written letters of horning in all points; a full double whereof to the will, with a just copy of charge subjoined thereto, I delivered to the said C D, personally apprehended, (or, I left at the dwelling-house of the said C D, with a servant therein, to be given to him, as I could not find him personally); WHICH copy of charge was subscribed by me, and did bear the date hereof, with the names and designations of O P and Q R, both residents in Edinburgh, witnesses present at the premises, and hereto subscribing with me.

M N, messenger.

O P, *witness.*

Q R, *witness.*

This is the form where the execution is on the back of the letters: Where it is on a separate paper, the alterations necessary are sufficiently obvious, viz. designing the parties and mentioning the date and signet- ing of the letters, the names of the lands, &c.

This horning, being duly executed forty days before the term of Whitsunday in the year of the tenant's removal, is produced to the Sheriff or Stewart, who is directed, by the Act of Sederunt, "to eject the tenant within six days after the term of removal appointed by the "tack." Upon inquiry at the Sheriff-clerk's office for the county of Edinburgh, I do not find that there is an instance of a charge of this kind; so completely does the process of warning before the Sheriff seem to exclude all other forms: though, no doubt, the form would be, as in the case of letters of ejection, for the Sheriff, upon the

production of a horning so executed, to issue his precept to his officers, directing them to remove the tenant at the time appointed by the Act of Sederunt.

Thus the removing of tenants was reduced into order by the act 1555; and the disadvantages with which the regulations of that act were attended, have been removed by the Act of Sederunt 1756; so that the whole has, in practice, arrived at the simple form of raising an action of removing forty days previous to the Whitsunday in the year in which the tenant must remove; or, where the tack contains an obligation to remove, in raising and executing a horning within the same time.

Summons of succeeding in the Vice.

GEORGE, &c. WHEREAS it is humbly meant and shewn to us by our LOVITE A, heritable proprietor of the lands and others after mentioned, THAT upon the he obtained decree of removing, at his instance, before against B, decerning and ordaining him to flit and remove himself, his family, servants, cottars, and dependants, goods and gear, furth and from all and whole the pursuer's lands of. , with the pertinents lying , and to leave the same void and redd, at the term of last, to the effect the pursuer, by himself, or others in his name, might enter thereto, and possess and enjoy the same at pleasure in all time to come. NOTWITHSTANDING WHEREOF, the said B, in manifest contempt of the said decree, did, on the , in a private and clandestine manner, remove from the said lands, and, by his connivance and collusion, C entered to the possession of the same, and that without any title from the pursuer; whereby the said C, by the connivance of the said B, has violently intruded himself, with his servants, cottars, dependants, goods, and gear, into the possession of the

said lands and pertinents, and thereby entered and succeeded in the vice and place of the said B and foresaids; and the said C has, by himself, and others in his name, violently and unwarrantably occupied and possessed the said lands, with their pertinents and others foresaid, together with the mails, farms, kail customs, casualties, profits, and duties of the same ever since; and which said lands and others foresaid were worth, and would have yielded to the pursuer, had they not been violently taken possession of, and intruded upon as said is, the avails, quantities, and prices after mentioned, viz. *(here take in the particular lands and their values, or a slump sum may be mentioned, and the particulars condescended on in the course of the process)* THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by DECREE of the LORDS of our COUNCIL in SESSION, that the said C has succeeded and come in the vice of the said B and his foresaids, who were lawfully charged to remove from the foresaid lands, and as he is liable for the violent profits thereof, in the same manner as the said B would have been, had he continued to possess the same, in contempt of the said charge; AND that the said C, and likewise the said B, by his connivance and collusion therein, by themselves or their foresaids, have done wrong in the said illegal intrusion and vicious intromission; and it being so found and declared, the said defenders OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, jointly and severally, to make payment to the pursuer, not only of the foresaid sum of £ , being the worth and value of the said lands and others foresaid, since the violent intromission of the said C, but also of the do mail or duty of the same, as the *pæna juris* for the intromission: AND FURTHER, the said C OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, instantly to flit and remove himself, his tenants, cottars, dependants, goods, and gear from the said

and others, and to desist and cease from labouring or possessing the same in time coming, to the effect the pursuer, by himself, or others in his name, may enter thereto, and peaceably possess and enjoy the same, and dispose thereof at pleasure; and until the said C remove as aforesaid, he and the said B OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to make payment to the pursuer, jointly and severally, of the foresaid sum of £ , as double the value of the said lands and others foresaid, yearly and in time coming. And lastly, to make payment to the pursuer, conjunctly and severally, of the sum of £ Sterling, as the expense of the process to follow hereon, and of extracting the decree to be pronounced therein, conform to the laws and daily practice of Scotland, used and observed in the like cases in all points, as is alleged.

OUR WILL IS HEREOFRE, &c.

APPENDIX IV.

Argument for the Tenant against the Landlord's privilege of Hunting over the Farm, taken from the Second Edition of this Work, p. 336, and referred to in this Edition, p. Foot Note.

ON this point, I may be forgiven for making a few observations, since their tendency will only be to render the landlord, who is desirous of preserving a power to do over his own grounds, careful to make an express reservation of that power in his leases.

The right of hunting is merely a right of killing, that description of animals known under the name of game; it is not a right connected with the property of land, since the acts by which the qualification is constituted, are intended to restrict an existing right, not to create a new one. The right of hunting was at one time, not only open to every man in the kingdom, but was enjoined as an exercise necessary for preserving the military spirit of the people; the power thus in every individual was, by the act 1621, c. 31, restricted; and those only who were possessed of a plot of land in heritage were declared qualified to hunt. This privilege does not entitle a qualified person to

in the fields of another, it gives merely a right of killing game in those places to which he has free access.

There is, therefore, no magical power in the term *hunting*; and a landlord, when he pretends to have a right to traverse the fields of his tenant, for the purpose of hunting, is equally entitled to say, that he enjoys the same privilege in prosecution of a botanical research, or in any other pastime in which he may choose to indulge.

If a landlord has a power of entering at all times on any part of his tenant's possession for his amusement, he must be equally entitled to do so, where it is connected with his own convenience; of course he must be entitled to make a road for himself through the most convenient part of the farm. But this will scarcely be said to be within the power of the landlord; and yet the power of excluding the landlord from using a road, implies in it the power of excluding him from those individual acts of trespass, of which the road is the aggregate; or will it be said that a landlord, though he cannot pass through the fields of his tenant for his convenience, may do it for his amusement?

It may perhaps appear to be a strong argument in favour of the landlord, that no opposition to the exercise of this privilege has hitherto been made by the tenantry of this country. But when the situation of the tenantry, and the state of husbandry is considered, it ought not to appear surprising, that a question of this kind should occur only when attention begins to be paid to the true interests of agriculture; and the same sound policy which at one time prescribed hunting as a means of augmenting national strength, ought now, with the same view, to protect with equal care the operations of the farmer.

It were strange, indeed, should the law protect the most barren hill in the Highlands, a property not susceptible of injury, while it refuses to protect rich enclos-

ed fields under lease, from the destructive intrusion of huntsmen and their followers; intrusions, which must derange the operations on which the individual success of the farmer, as well as the advantage of the country at large depends. It is true, he would be entitled to redress, but that redress, which a tenant might find in a Court of law, is one to which no prudent man will resort. And whether a burden of this kind ought, in the present state of husbandry, to be imposed on the operations of the farmer, is a question that merits a very serious and deliberate consideration.

The reasoning in the printed petition, on which the bill of advocacy was passed, is so clear and forcible on this point, that it may not be improper to give an abstract of it. Animals, *feræ naturæ cedunt occupanti*; yet a proprietor of land is entitled to debar all persons from hunting after them over his ground. This was the principle of the Roman law, and the same rule has been adopted by the law of Scotland, which holds, that the proprietor of lands, though he has no property in the game, may indirectly debar others from seizing on them, by excluding them from his grounds. This arises from the scrupulous regard which is paid to the exclusive nature of property, and which preserves, with the utmost anxiety, the possessions of every one from intrusion. This was established in the cases of the Marquis of Tweeddale and the Earl of Breadalbane; and as they fix the proprietor's right to the free and unmolested possession of his lands, it is next to be considered, whether this right of undisturbed possession be transmitted by the landlord to the tenant.

And thus far it cannot be doubted, that the tenant has an exclusive title to all the possible fruits of the soil, and to the exclusive possession of the surface, for the purpose of raising these fruits, and for the comfortable and quiet occupation of himself, his family, and his live stock. If, then, it be clear that the proprietor, in vir-

due of his right of exclusive possession, can debar any one from entering on his property for sport; it seems to follow, that by bestowing on the tenant the right of using and enjoying the property, and by becoming bound to warrant the grant against all mortals, he not only should not obtrude himself, but is bound to prevent all others from obtruding.

Upon this principle, the tenant is entitled to maintain himself in possession against all and sundry. He may prevent any one from passing through his lands, and is (no more than the proprietor) bound to prove that he thereby sustains any special damage, nor would he be obliged to submit to such liberties, even were caution offered to indemnify him for any damage he may sustain. In short, in all questions with third parties, he is to be considered as actual proprietor, and he has the same right to exclude any person from access to his farm, that he has to debar them from entering into his house, or using his furniture or clothes. In such cases, much might be suffered, though no special damage could be qualified. Every one feels, that the domestic privacy of a family is not to be disturbed by the intrusion of strangers, whether landlord or not. But the case is evidently the same, though not in degree, where a landlord, with a troop of horsemen and dogs, takes the liberty of traversing the tenant's possessions; and considering it merely as an intrusion, the tenant must feel it as an undue liberty, against which he has a right to be protected. Gentlemen living together in habits of society, will be apt to overlook the offensive nature of such an intrusion committed against their tenant; they either enjoy the pleasures of the chase themselves, or are able to gratify their friends. But the case is very different with the plain industrious farmer, whose domestic arrangements all suffer a degree of interruption. His cattle are alarmed at their pasture, his labourers are diverted from their work, and his homely privacy exposed to

the eyes of strangers, with whom he has no habits of intercourse. If such liberties are to be given to a landlord, it ought to be only under an express stipulation.

The landlord, by letting the farm, is understood to have transferred the possession for a valuable consideration, and the tenant is entitled to preserve and gather in the fruits of his farm; this right neither landlord nor stranger can impair. Hence the tenant is entitled to pursue possessory actions, and to claim damage for any trespass committed on his ground, in the same way with the landlord himself; and from this exclusive right in the tenant, it is apprehended, that even the landlord himself is not exempted. The landlord has delegated to the tenant his right in the fruits of the soil, and bestowed on him the power of cultivating the farm; and exclusive and undisturbed possession being essential to the exercise of these powers, it ought to require a very unequivocal and explicit declaration on the part of the landlord, to enable him to interfere with the possession of the tenant, and to impede his operations; and, therefore, the liberty of hunting over the farm, to the detriment of the crop, and molestation of the tenant, can be sanctioned by no principle of law or justice.

But the inconvenience suffered by the tenant will not be the only consequence. In certain situations, particular modes of culture would be entirely put a stop to; indeed the improvement of clay soils would be rendered nearly impracticable, for in proportion as they are brought into a proper tilth by horse-hoeing and similar operations, they will be injured by the trespass of hunters; nor would the damage be confined to a single crop, for the soil thus deteriorated during the wheat crop, the whole subsequent rotation of crops would be materially injured, and the damage would not only be great, but impossible to be ascertained.

This case has been assimilated with that of the landlord's right to work mines; but there is this difference

between them, that the tenant has no right to the mines, as he has by his lease to the possession of his farm. Besides, the landlord has a patrimonial interest in these operations, while the public also is concerned that the minerals shall not be rendered useless.—Such was the strain of argument laid before the Court. This is a point, which, being once suggested, the peace, as well as interest of the parties require that it should be settled by a judgment in the last resort; it will otherwise remain as a source of dispute, to which the landlord or tenant may resort, as a means of gratifying ill humour.


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